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No. 04-

IN THE

Supreme Court of the United States

KATURIA E. SMITH, ET AL.,

Petitioners,

v.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The two questions presented in this case relate to the application of strict scrutiny to the race-conscious admissions policy in effect at the University of Washington Law School when petitioners sought admission there between 1994 and 1996.

Those questions are:

1. Is a race-conscious law school admissions program narrowly tailored absent a judicial finding or any evidence in the record that the law school gave "serious, good faith consideration" (*Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003))—or indeed any consideration to all—to the use of race-neutral alternatives?

2. Can a race-conscious law school admissions program be justified and survive strict scrutiny as being designed to enroll a "critical mass" of minority students if the program has the effect of producing entering classes comprised of upwards of 43%, and on average more than 35%, minority students?

PARTIES TO THE PROCEEDING

Petitioners, Katuria E. Smith, Angela Rock, and Michael Pyle, were the appellants in the court below. Respondents, the University of Washington Law School, Wallace D. Loh, Sandra Madrid, Richard Kummert, Michael Townsend, and Roland Hjorth, were the appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Katuria E. Smith, Angela Rock, and Michael Pyle respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 392 F.3d 367 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Western District of Washington is unreported and reproduced at App. 25a.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 20, 2004. App. 1a. On March 14, 2005, Justice

O'Connor extended the time to petition for certiorari to and including April 19, 2005. App. 60a. The jurisdiction of the Ninth Circuit was based on 28 U.S.C. § 1291. *See* App. 5a ("We have jurisdiction under 28 U.S.C. § 1291."). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides: "[N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1.

42 U.S.C. § 1981 provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

42 U.S.C. § 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

Petitioners. Katuria E. Smith, Angela Rock, and Michael Pyle applied for admission to the University of Washington Law School ("the Law School") in 1994, 1995, and 1996, respectively. In those years, the Law School's admissions form asked each applicant "[w]hat race do you consider yourself to be in?" Petitioners each checked the box marked "white." Each of their applications to the Law School ultimately were rejected. App. 27a-28a, 35a (Dist. Ct. Findings of Fact ("FOF") ¶¶ 1-2, ¶ 32).[1]

Respondents. The Law School is a state-operated institution that received federal funds at all times material to this

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[1] Petitioners Smith and Rock were later admitted to, and graduated from, Seattle University School of Law and Georgetown University Law Center, respectively. Petitioner Pyle in 1999 reapplied to the Law School and was admitted, but he elected not to attend. App. 27a-28a (FOF ¶ 1).

case. The individual respondents were administrators of the Law School and involved in the Law School's admissions process within the period 1994 to 1996. App. 28a (FOF ¶¶ 3-8).

The Law School's Admissions Policy Prior to 1989. The Law School was established in 1899. Stipulated Facts ¶ 10. For more than half a century, admissions to the Law School were non-selective; all applicants who met minimum qualifications were admitted regardless of race. App. 29a (FOF ¶ 9). In the late 1950s, the Law School began admitting students based on LSAT scores and GPA. Stip. Facts ¶ 12.

Until 1968, the Law School did not consider race in this process. *Id.* ¶ 13. In that year, the Law School instituted an admissions program for applicants considered racial minorities; the Law School referred to those admitted under this program as "special admissions." *Id.*

Between 1977 and 1989, the Law School's published admissions policy stated that the Law School "gives special consideration to applicants who are members of racial and ethnic minority groups that have been subject to long-continued, pervasive discrimination sanctioned by the legal system and that would not otherwise be meaningfully represented in the entering class." App. 29a (FOF ¶ 12). The 1977-89 policy gave as examples of such groups "Asian Americans, Black Americans, Chicanos, Filipino Americans, Native Americans/Indians, and Puerto Rican Americans." *Id.* Under the Law School's 1977-89 policy, "membership in those groups was considered a positive admissions factor so as to enhance the 'diversity' of the student body." App. 29a-30a (FOF ¶ 12).

The Law School's Post-1989 Policy. In 1989, the Law School revised its admission policy after several of the Law School's constitutional scholars raised questions about the policy. The Law School faculty voted to change the policy to one that would conform to the type of admissions policy

upheld in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). App. 30a (FOF ¶¶ 13-15).[2]

Section 1 of the post-1989 policy—as stated in the Law School's Admissions Bulletin every year from 1990 to 1998—provided that the policy was designed to promote diversity of both the student body and the legally trained segment of the population. App. 30a (FOF ¶ 16).[3]

Section 2 of the policy stated that, for admissions purposes, the Law School relied primarily on the applicant's undergraduate GPA and LSAT performance. Section 2 went on to say that "where numerical indicators do not appear to be an adequate measure of academic potential," the Law School would consider other factors. App. 31a (FOF ¶ 19).

Section 3 stated that "racial or ethnic origin" was a "diversity" factor considered by the Law School in admissions decisions. App. 31a (FOF ¶ 20).

The Law School has admitted that it "considered race as a factor in admissions during the 1994, 1995, and 1996 admissions cycles, when [petitioners] applied." Stip. Facts ¶ 22.

Significantly, the District Court made no factual finding that the Law School, when it revised the race-conscious component of its admissions policy in 1989, or indeed, at any

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[2] Another reason the Law School revisited its policy was the publicity given to the Law School's decision to deny admission to a while applicant who "had made her way through undergraduate school at the university as a welfare mother" and who was admitted to Harvard Law School. Trial Tr. 204 (testimony of Admissions Committee chair Richard Kummert).

[3] The District Court found that the reference to the goal of diversifying "the legally trained segment of the population" remained in the Admissions Bulletin as a result of respondents' oversight and was not considered as an admissions goal, at least not during the years petitioners sought admission. App. 31a (FOF ¶17).

time, gave any consideration to using race-neutral means of achieving the racial and ethnic diversity it sought. Nor did respondents even propose that the court make such a finding. *See* Defendants' Corrected Proposed Findings of Fact & Conclusions of Law. Instead, they asked the District Court to find that *petitioners* had failed to suggest alternative approaches. *See id.* at 17 ("The plaintiffs have suggested no alternative to the Law School's approach that would have both achieved diversity and preserved the Law School's ability to select those students that it deemed most qualified.").

The Effect of the Law School's Race-Conscious Policy on Minority Admissions and Enrollment. In each of the years that petitioners sought admission, the Law School received some 2,000 applications for approximately 165 positions. App. 37a (FOF ¶ 42). The top 250 to 300 candidates based on an index score—a weighted tabulation of undergraduate GPA and LSAT score—comprised a "presumptive admit" category. App. 37a (FOF ¶¶ 41-42). Applicants below the presumptive admit line were considered to be in either a "discretionary" or "presumptive deny" group. App. 37a (FOF ¶ 43).[4]

Based on the race-blind index scoring, the presumptive admit cohort in the relevant years was 89% white, 8% Asian, and 3% other minorities. App. 37a (FOF ¶ 42). The actual admissions rates in those years for various racial and ethnic groups, however, were as follows:

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[4] Petitioner Rock was a presumptive admit based on her index score. App. 44a-45a (FOF ¶ 69). Petitioner Smith had an index score of 192, five points below the presumptive admit threshold; still, the District Court found she was "a well qualified applicant for Law School admission." App. 40a-41a (FOF ¶¶ 55-57). Petitioner Pyle's index score in 1996 was two points below the presumptive admit line for Washington residents. App. 46a-47a (FOF ¶¶ 78-79).

Filipino	34.59%
Hispanic	30.24%
Native American	28.80%
African American	29.60%
Asian	23.88%
White	22.76%

App. 39a (FOF ¶ 51).

What these numbers strongly suggest the courts below expressly confirmed: "Next to index score, race was the most significant factor in the admissions decisions." App. 50a (FOF ¶ 82(n)). *Accord* App. 4a.

Indeed, based on expert testimony proffered by both sides, the District Court found that in the relevant time period (1) the Law School was "much more likely" to admit a minority applicant than a white applicant with identical admissions statistics, and (2) an applicant's race or ethnicity was "the most important diversity factor affecting admissions decisions." App. 48a, 49a (FOF ¶¶ 82(c), (e)).

The Law School's post-1989 race-conscious admissions policy—touted by the Law School itself as one of the most progressive in the nation[5]—had the predictable and desired effect: Minority students, as a percentage of students in each

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[5] As part of an inspection of the Law School by the Association of American Law Schools and the American Bar Association for purposes of AALS membership compliance and ABA accreditation, the Law School stated in a site-evaluation questionnaire that the Law School "maintains one of the most progressive and outstanding minority admissions programs in the nation" and touted its "increase of over 100% in the amount of minority students admitted and enrolling at the Law School" since the last accreditation process. App. 34a-35a (FOF ¶ 30). Dean Wallace Loh once wrote that the Law School was "the second most diverse" law school in the country, behind only UCLA. Trial Tr. 471, 474.

entering class, which had ranged from 7% to 18% in prior years, jumped overnight to approximately 35%. Thus, the percentage of minority students *doubled* as compared to prior "high" minority-enrollment years and *quintupled* as compared to prior "low" minority-enrollment years.

The percentage of non-minority students at the Law School had been between 7% and 18% throughout the late 1980s. App. 33a (FOF ¶ 23). That percentage, the District Court found, "increased dramatically" beginning in 1990, when the first class admitted under the 1989 policy matriculated. *Id.*

In the years between 1990 and 1998 (except for two years the District Court deemed "unusual"), minority students represented approximately 35% of entering classes at the Law School. App. 33a (FOF ¶ 24). In those two "unusual" years, minority enrollment at the Law School was even higher. In 1994, minority students represented 43.3% of enrollees. Stip. Facts ¶ 23; App. 12a n.4.

Proceedings Below. Petitioners filed suit in 1997, alleging that the Law School and the individual respondents had unlawfully discriminated against them on the basis of race, in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. Their suit sought damages as well as declaratory and injunctive relief.

In 1998, Washington voters passed Initiative 200, which provided that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting." Wash. Rev. Code § 49.60.400(1). The University of Washington president subsequently issued a directive that "eliminated the use of race as a criterion in [the University's] admissions processes." *Smith* v. *University of Wash. Law School*, 233 F.3d 1188, 1192 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

The District Court thus dismissed as moot petitioners' declaratory and injunctive claims—but not their damages claims—and the Ninth Circuit in 2000 upheld that decision. *See Smith*, 233 F.3d at 1195.[6] The District Court still had to decide, therefore, "whether the [petitioners] might be entitled to damages." App. 2a.

In 2002, after a bench trial, the District Court held that the Law School's "admissions program for the years of 1994, 1995, and 1996 was narrowly tailored to achieve the compelling state interest of educational diversity and does not violate federal law." App. 59a (Conclusion of Law ¶ 17).

Petitioners appealed to the Ninth Circuit, which deferred briefing pending this Court's decisions in the *Grutter* and *Gratz* cases. *See Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003).

In late 2004, 18 months after *Grutter* and *Gratz* had been decided, the Ninth Circuit affirmed the District Court's decision. The Ninth Circuit stated that "[i]n light of the criteria the Supreme Court has now articulated, we hold that the district court correctly concluded that the Law School's admissions program during 1994-96 'was narrowly tailored to achieve the compelling state interest of educational diversity.' " App. 12a.

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[6] In 2001, petitioners filed a petition for certiorari, denied by this Court, 532 U.S. 1051 (2001), that presented the question whether diversity is a compelling governmental interest for purposes of strict scrutiny. The Court has now answered that question. *See Grutter* v. *Bollinger*, 539 U.S. 306 (2003).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF *GRUTTER* AND TWO CIRCUIT COURT DECISIONS THAT NARROW TAILORING REQUIRES A PUBLIC SCHOOL WITH A RACE-CONSCIOUS ADMISSIONS PROGRAM TO GIVE SERIOUS, GOOD FAITH CONSIDERATION TO WORKABLE RACE-NEUTRAL ALTERNATIVES.

A. The Ninth Circuit's Decision Conflicts With *Grutter*'s Teaching That A Law School's Consideration Of Race-Neutral Alternatives Is A Requirement Of Narrow Tailoring.

It is now well established that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny,' " which "means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326 (quoting *Adarand* v. *Peña*, 515 U.S. 200, 227 (1995)). *See also Gratz*, 539 U.S. at 270; *Johnson* v. *California*, 125 S. Ct. 1141, 1146 (2005).

In *Grutter*, this Court held that one of the requirements of narrow tailoring in the university admissions context is the exploration by the university of race-neutral alternatives. Although it "does not require exhaustion of every conceivable race-neutral alternative," this Court explained that "[n]arrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339.

Here, noticeably absent from the District Court's copious Findings of Fact is any finding that the Law School—whether in 1989 when the Law School amended its policy or, indeed, at any time—gave serious, good faith consideration to using race-neutral means of obtaining the desired student body diversity. Nor is there is any evidence in the record that

the Law School did so. The Law School's admissions policy cannot survive strict scrutiny in the absence of such an affirmative finding and evidence of record. *See id.* (explaining that a race-based program is "not narrowly tailored where 'there does not appear to have been any consideration of the use of race-neutral means' ") (quoting *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 507 (1989)). *See also Gratz*, 539 U.S. at 280 (O'Connor, J., concurring) ("the record before us does not support the conclusion that the University of Michigan's admission program" is narrowly tailored).[7]

In *Grutter*, this Court said "[w]e are satisfied that the Law School adequately considered race-neutral alternatives." 539 U.S. at 340. *See also Grutter* v. *Bollinger*, 288 F.3d 732, 750 (6th Cir. 2002) (en banc) (stating that "the record does indicate the Law School considered and ultimately rejected various race-neutral alternatives to the consideration of race and ethnicity" and that "we find that the Law School has adequately considered race-neutral alternatives."), *aff'd*, 539 U.S. 306 (2003). Here, however, in stark contrast to the conclusions of this Court and the Sixth Circuit in *Grutter*, the Ninth Circuit made no such determination.

In the decision below, the Ninth Circuit recognized that *Grutter* requires "serious, good faith consideration" of race-neutral alternatives App. 9a, 10a. The Ninth Circuit stated that, under *Grutter*, there are

> five hallmarks of a narrowly tailored affirmative action plan: (1) the absence of quotas; (2) individualized consideration of applicants; (3) serious, good faith considera-

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[7] The District Court did find that the Law School "attempted to increase minority enrollments through methods other than admission preferences. The Law School sought to recruit qualified minorities through a variety of pre- and post-application programs." App. 35a (FOF ¶ 31). But that finding merely indicates that the Law School used race-conscious means other than admissions preferences to increase minority enrollment.

> tion of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point. [App. 9a.]

The Ninth Circuit then concluded that the Law School's program in 1994-96 was "consistent with the hallmarks described in *Grutter*." App. 12a. But although the Ninth Circuit analyzed each of the other four factors (as strict scrutiny and *Grutter* require), the court *said not a single word* about whether the Law School had given thought to racially-neutral means of achieving diversity. *See* App. 12a-14a.

The Ninth Circuit's failure to answer the question whether the Law School adequately considered race-neutral alternatives is especially glaring since petitioners raised the issue below, pointing specifically to the "serious, good faith consideration" requirement articulated in *Grutter*. *See* Petitioners' C.A. Br. 38-39. And, although it was not their burden to do so, petitioners identified one race-neutral alternative that the Law School did not explore—the Law School's failure, since at least 1989, to consider whether it should have eliminated the preference given to Asian Americans. *See id.* at 41-43; Petitioners' C.A. Reply Br. 6-7.[8] *See also* Trial Tr. 342-343 (testimony of Admissions Committee chair Richard Kummert that he knew of no discussion, since 1989, of whether there was a continuing need for a diversity preference for Asian Americans).[9]

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[8] There was some discussion by admissions personnel in the 1980s regarding whether the preference for Asian Americans should be retained. *See* Trial Tr. 494-495. There is no evidence, however, that serious, good faith consideration was given to that question at that time—or that *any* consideration was given to that question in the 1990s, when petitioners applied for admission.

[9] It is not at all clear that the Law School needed to give a preference to Asian Americans in order to enroll a significant number

The Law School sought to shift to petitioners the burden of demonstrating the existence of race-neutral alternatives, *see* Defendants' Corrected Proposed Findings of Fact & Conclusions of Law at 17 (proposing a finding that petitioners "have suggested no alternative" that would have achieved diversity and preserved the Law School's desire level of selectivity), but the Law School has the burden of proof backwards. The Law School's race-conscious policy is subject to strict scrutiny. Thus, it is the Law School that bears the burden of proof here. *See Gratz*, 539 U.S. at 270 ("To withstand our strict scrutiny analysis, *respondents* [the University of Michigan *et al.*] *must demonstrate* that the University's use of race in its current admission program 'employs narrowly tailored measures that further compelling governmental interests.' ") (quoting *Adarand*, 515 U.S. at 227) (emphasis

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of Asian American students or avoid the underrepresentation of such students. *Cf. Grutter*, 539 U.S. at 319 (race-conscious law school admissions policy did not apply to Asians or Jews, even though those groups have experienced discrimination, because "members of those groups were already being admitted to the Law School in significant numbers"). With the preference, Asian Americans represented 18% of admitted applicants in 1994 and 14% in 1995 and 1996. App. 17a. Had there been no preference, Asian Americans would have comprised some 7%-9% of entering classes. *Id.* Thus, even without a preference, Asian American students would not have been "underrepresented" at the Law School. *See* App. 53a (FOF ¶ 92) ("In 1990, approximately 5.1% of the resident population of Washington was Asian or Pacific Islander (including Filipino) * * *."). *Cf. Grutter*, 539 U.S. at 320 (under race-blind admissions system, "underrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent."). To be sure, if the Law School had considered whether a preference for Asian Americans was necessary, and concluded that it was not, that would not have made the Law School's policy race-neutral, but it would have moved the policy in that direction and made it less race-based. *See id.* at 342 (racial classifications "may be employed no more broadly than the interest demands.").

added); *see also* App. 6a ("The Law School bears the burden of demonstrating that its consideration of race and ethnicity in its admission decisions was narrowly tailored to serve a compelling interest.").

The Law School considered the race of applicants in its admissions process for 30 years, from 1968 until the people of Washington voted in 1998 to eliminate the consideration of race in public education and other areas. Yet the Law School in this case introduced no evidence that it gave consideration to race-neutral alternatives in 1968, when it began to consider race; in 1977 when it published a race-conscious policy; or in 1989 when it revisited and revamped its policy. Indeed, the Law School presented no evidence that it considered race-neutral alternatives at any time during its three-decades-long practice of race-conscious admission. Nor did the District Court or the Ninth Circuit make any finding or determination that the Law School gave serious, good faith consideration to race-neutral alternatives. The decision below thus irreconcilably conflicts with *Grutter*.

B. The Ninth Circuit's Decision Also Conflicts With Decisions Of The Fifth And Eleventh Circuits Requiring Schools To Consider Race-Neutral Alternatives.

1. This Court granted certiorari in *Grutter* to resolve a conflict between the Fifth Circuit and Ninth Circuit on the question whether diversity is a compelling interest in the context of public university admissions. *See Grutter*, 539 U.S. at 322 (inviting comparison of *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), with *Smith* v. *University of Wash. Law School*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001)).

The Fifth and Ninth Circuits once again are in conflict. The decision below squarely conflicts with an opinion handed down by the Fifth Circuit just last month. *See*

Cavalier v. *Caddo Parish School Board*, ___ F.3d ___, 2005 WL 469611 (5th Cir. Mar. 1, 2005).

In that case, the parents of Hunter Cavalier brought suit against the Caddo Parrish School Board, contending that "the School Board illegally discriminated against Hunter Cavalier on the basis of his race when he was denied admission to Caddo Middle Magnet School." *Id.* at *1. The School Board admitted "that its admission policy for CMMS does employ racial classifications," but argued that the policy was required by a 1981 court-ordered consent decree. *Id.* at *1, *2. The Fifth Circuit rejected that argument, saying that "[b]ecause this consent decree no longer applies to CMMS, it cannot justify the Board's policy." *Id.* at *2.

The Fifth Circuit then went on to hold that "even if the 1981 Consent Decree were still in some respects applicable to CMMS, the School Board's policy is not narrowly tailored." *Id.* at *11. In so holding, the court explained that "there is no evidence that the School Board has considered any race-neutral means which might arguably result in an increase in the percentage of black students at CMMS." *Id.* The Fifth Circuit accordingly held that the policy was unconstitutional.

The decision below is in direct conflict with *Cavalier*. What the Fifth Circuit said there can also be said here, almost word for word: "there is no evidence that the [Law School] has considered any race-neutral means which might arguably result in an increase in the percentage of [minority] students at [the Law School]." Yet the Caddo Parish School Board's policy was declared unconstitutional by the Fifth Circuit whereas the Law School's policy was upheld by the Ninth Circuit. The conflict between the two decisions is manifest.

2. The Ninth Circuit's decision in this case also conflicts with the Eleventh Circuit's decision in *Johnson* v. *Board of Regents of the Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001). There, the Eleventh Circuit held that the University of

Georgia's freshman admissions policy for 1999—a race-conscious program defended by the school on diversity grounds—failed strict scrutiny and was unconstitutional for lack of narrow tailoring.

Johnson applied the same standard this Court applied two years later in *Grutter*: "As we have made clear, while strict scrutiny does not require exhaustion of every possible alternative, it does require serious, good faith consideration of race-neutral alternatives, either prior to or in conjunction with implementation of an affirmative action plan." *Id.* at 1259 (brackets, quotation marks, and ellipses omitted). The court then held that the University of Georgia had not met that standard: "UGA fails to show on this record that it meaningfully considered, let alone rejected as insufficient, any wholly race-neutral alternatives to the race-conscious admissions policy adopted for the Fall 1999 class." *Id.* "This failure of proof," the Eleventh Circuit explained, "demonstrates why UGA has not met its burden of demonstrating that its freshman admissions policy is narrowly tailored." *Id.* at 1260.

So too here, it was the Law School's burden to prove that it gave meaningful consideration to race-neutral alternatives. The Law School failed to carry that burden and would have lost this case had it been decided by the Eleventh Circuit. Thus, the decision below and the *Johnson* decision are in direct conflict.

The Eleventh Circuit in *Johnson* noted that "[i]t is beyond dispute that there are race neutral measures that potentially may advance the goal of creating a diverse student body. Recruiting, advertising, financial incentives to admittees from less advantaged homes, and other outreach strategies all may play an important role in ensuring that the qualified applicant pool contains individuals from a wide variety of backgrounds." 263 F.3d at 1259. *See also Cavalier*, 2005 WL 469611, at *11 n.16; Brief for the United States as

Amicus Curiae in *Grutter* v. *Bollinger* 13-18.[10] If there were no race-neutral alternatives to the Law School's admissions program even worthy of consideration, it was the Law School's burden to prove that fact. It surely cannot be assumed that there were no workable race-neutral alternatives to be considered.

In short, this Court should grant review to resolve the clear conflict between the Ninth Circuit's decision in this case and the decisions of the Fifth and Eleventh Circuits in *Cavalier* and *Johnson*. *See* S. Ct. R. 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals"). There can be no doubt, moreover, that "the disagreement among the Court of Appeals [is] on a question of national importance." *Grutter*, 539 U.S. at 322.

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[10] The Solicitor General in his *amicus* brief in *Grutter* commented on various race-neutral alternatives that have proved successful in a number of states: "Schools may identify and discard facially neutral criteria that, in practice, tend to skew admissions in a manner that detracts from educational diversity. They may also adopt admissions policies that seek to promote experiential, geographical, political or economic diversity in the student body, which are entirely appropriate race-neutral governmental objectives. The adoption of such policies, moreover, has led to racially diverse student bodies in other States. * * * As the experience in Texas, Florida, and California demonstrates, public universities have ample race-neutral means available to achieve objectives such as educational diversity, openness, and broad participation." Brief for the United States as *Amicus Curiae* 13-14, 17.

II. THIS COURT SHOULD CLARIFY WHETHER A LAW SCHOOL SEEKING TO ENROLL A "CRITICAL MASS" OF MINORITY STUDENTS MAY USE A RACE-CONSCIOUS ADMISSIONS PROGRAM THAT RESULTS IN ENTERING CLASSES CONSISTING OF UPWARDS OF 43%, AND ON AVERAGE MORE THAN 35%, MINORITY STUDENTS.

In *Grutter*, the University of Michigan Law School ("UMLS") defended, and this Court upheld, the UMLS's race-conscious admissions program on the ground that "a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." 539 U.S. at 333.

The *Grutter* Court gave some guidance as to the meaning of critical mass and when a class reaches a critical mass of minority students. The Court noted that UMLS's "concept of critical mass is defined by reference to the educational benefits that diversity is designed to achieve," *i.e.*, promoting "cross-racial understanding," "break[ing] down racial stereotypes," and the view that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id.* at 330 (quotation marks omitted).

Attaining such benefits, this Court said, requires more than "token numbers of minority students." *Id.* at 333. Rather, it requires that minority students be admitted "in meaningful numbers." *Id.* at 338. The UMLS Dean testified that "critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 319.

The Court also recognized the need to ensure that a law school's "goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota." *Id.* at 335-336. On that score, the Court noted that "between 1993 and 2000, the number of African-American,

Latino, and Native-American students in each class at [UMLS] varied from 13.5 to 20.1 percent, a range inconsistent with a quota." *Id.* at 336.[11]

Even if a race-conscious program of the plus-factor variety does not have the effect of a quota (*i.e.*, the admission or enrollment of a fixed percentage or number of minorities), there surely must be a point at which such a program, in the pursuit of the goal of enrolling a "critical mass" of minority students, will go well beyond the point necessary to obtain critical mass and into unconstitutional territory. A law school might have too expansive a notion of critical mass. Or it might simply have enacted a program that admits more minority students than is necessary to obtain critical mass. Either way, a critical-mass-seeking program will at some point go too far in terms of reducing the number of seats available for persons excluded from the racial preference. *See id.* at 341 (narrow tailoring "requires that a race-conscious admission program not unduly harm members of any racial group"). For instance, it is hard to see how a program that had as its goal the enrollment of 50% minority students could be justified with reference to "critical mass" theory.[12]

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[11] By that statement, the Court meant that the *fluctuation* from year to year in the percentage of enrolled minority students at UMLS was inconsistent with a quota. An admissions quota can, of course, be set within a 13% to 20% range. Indeed, the quota scheme at issue in *Bakke* reserved 16 out of 100 seats in a medical school class—or 16%—for minority group members.

[12] We therefore take issue with the Ninth Circuit's statement that "*Grutter* explicitly refrained from setting a cap on what could constitute a critical mass." App. 19a. Although *Grutter* did not set an explicit cap number, the notion of critical mass must have a limit. A law school surely could not conclude that critical mass necessitated a class comprised of a majority of minority students.

The question whether the Law School has crossed the line in this case is a serious one.[13] The Law School operated (in its words) "one of the most progressive and outstanding minority admissions programs in the nation." In contrast to the UMLS program, which resulted in classes comprised of between 13.5% and 20.1% minority students, the Law School's program yielded classes comprised of between 24.4% and 43.3% minority students. App. 12a n.4.[14] Whatever critical mass is, it seems fair to say that a class consisting of more than 43% minority students has met that standard—and then some. And even a minority student percentage of 24.4%—the *lowest* percentage of any Law School class between 1990 and 1998—is *greater than the greatest* percentage of any UMLS class between 1993 and 2000. If, as the Ninth Circuit said in this case, "the goal of critical mass is to provide for meaningful numbers, or meaningful representation, such that minority students are encouraged to participate in the classroom and not feel isolated," App. 19a, there is a real question whether the Law School's admissions policy, which had the effect of enrolling

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[13] Like the UMLS program, the Law School's admissions program sought to obtain a critical mass of minority students. *See* App. 17a-19a; Defendants' Corrected Proposed Findings of Fact & Conclusions of Law 22 (proposing a finding that "[t]he weight given to race was appropriate in light of the mix of applicants available and the need to make offers to a sufficient number of minority applicants so as to enroll a critical mass of students of color.").

[14] The District Court here found that, between 1990 and 1998, the Law School's program produced entering classes averaging approximately 35% minority students—more than 2.5 times the UMLS "low" of 13.5% and well above even the UMLS "high" of 20.1%. App. 33a (FOF ¶ 24). And that 35% figure is artificially low because the District Court threw out of its database two "unusual" years in which minority enrollment was significantly higher, including the 1994 class comprised of more than 43% minority students.

classes comprised of upwards of 43%, and on average more than 35%, minority students went too far.

Respondents averred—indeed, they proposed that the District Court find—that if a race-blind admissions process had been used during the years in question, minority students would have made up 11%-15% of entering classes. *See* Defendants' Corrected Proposed Findings of Fact & Conclusions of Law at 16. Those percentages are not far from the percentages that UMLS obtained *with* a racial preference, and one could forcefully argue that such double-digit representation is critical mass. *See* Trial Tr. 291-292 (testimony of Professor Stewart Jay that the Law School did not need to treat sexual orientation as a diversity factor because "in any given class you probably will have five or ten percent of the students who are gay or lesbian."); *id.* at 338-339 (testimony of Admissions Committee chair Richard Kummert that gays and lesbians are "adequately represented" without an admissions preference and that 2%-3% of the Law School's student body is openly gay or lesbian). *See also* Brief for Respondents in *Grutter* v. *Bollinger* at 7 (draft UMLS policy stated that "the Law School was likely to obtain the benefits of a critical mass when minority enrollment ranged between 11 and 17%"); *United States* v. *Virginia*, 518 U.S. 515, 523 (1996) (quoting trial court's finding that, with "at least 10% female enrollment," VMI would have "a sufficient 'critical mass' to provide the female cadets with a positive educational experience").

In sum, this Court should grant review to clarify the meaning of critical mass and determine whether the Law School's race-conscious program for 1994 to 1996 comports with critical mass theory.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR DEVELOPING THE LAW IN THIS AREA.

1. At first glance, the fact that the race-conscious admissions policy in effect at the Law School when petitioners applied for admission is no longer operative would seem to be a compelling reason not to grant review. But first glances can be very deceiving. On closer inspection, this aspect of the case is a great virtue, not a vice. The reason is that deciding the constitutionality of the policy applied to petitioners in 1994-96 would allow this Court to develop the law in this exceedingly important area without disrupting the Law School's current admissions program. Thus, the Court can answer the questions presented in this case without throwing into turmoil an ongoing admissions program.

That is not to say that this case is moot. Far from it. Because of Initiative 200, the Law School no longer considers race in the admissions process. Initiative 200 thus mooted petitioners' claims for forward-looking relief (*i.e.*, their request for an injunction and a declaratory judgment) but it did not moot their claims for a remedy for past discrimination (*i.e.*, their request for damages).

2. The cert-worthy question in this case is whether the race-conscious admissions policy applied to petitioners is unconstitutional. That question is presented here whether or not petitioners would have been admitted to the Law School under a race-neutral scheme.

In the court below, the Law School argued that petitioners would not have been admitted to the Law School even if race had not been considered in the admissions process. *See* Respondents' C.A. Br. 10-16.[15] Assuming for the sake of

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[15] The Law School based that argument on certain factual findings made by the District Court. Petitioners contested those findings on appeal. *See* Petitioners' C.A. Br. 57-68. The argument heading for this section of petitioners' brief stated: "The Court's 'Same Decision' Findings Were Wrong." *Id.* at 57. *See also*

argument that the Law School is right (but see note 15, *supra*), that is not a reason to deny certiorari—which is the only question now before this Court.

Whether or not petitioners would have been denied admission under a hypothetical race-neutral admission scheme that never existed, if the race-conscious scheme that *actually was applied to them* is unlawful, their right to equal protection under the Constitution and federal civil rights statutes was violated. *See Northeastern Fla. Chapter of the Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993). Thus, the probability that petitioners would have been admitted to the Law School under a race-neutral admission policy is a consideration that may perhaps be relevant to the issue of the extent of petitioners' damages.[16] It certainly does not bear upon the question whether

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Petitioners' C.A. Reply Br. 24-30; *id.* at 24 (arguing that the trial court "made (1) contradictory and/or obviously erroneous factual findings with respect to Katuria Smith and Michael Pyle and (2) legal errors and similarly baseless findings with respect to Angela Rock."). Yet the Ninth Circuit inexplicably held that petitioners had "failed to make explicit their disagreements" with the trial court's factual findings. App. 3a n.1. In a very carefully worded final footnote, the Ninth Circuit said that "[t]he district court's findings do not establish that any of the plaintiffs would have been admitted to the Law School but for the challenged policy." App. 24a n.14. That is different from saying that those findings *do* establish that plaintiffs would *not* have been admitted to the Law School.

[16] It is clear that, at a minimum, petitioners are entitled to recover nominal damages if an unconstitutional admissions process was applied to them, whether or not they would been admitted under a constitutionally-permissible process. *See Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978). *Cf. Gratz* v. *Bollinger*, 353 F. Supp. 2d 929, 936 (E.D. Mich. 2005) (holding that the *Gratz* plaintiffs were prevailing parties, and thus entitled to an award of attorneys' fees, notwithstanding the *Gratz* defendants' argument that the plaintiffs had failed to show that they "*would have been*

their federal rights were violated. The Law School's "same result" argument thus has no bearing on whether this Court should grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 2005

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admitted if the University had considered race in the manner approved by *Grutter*") (emphasis in original).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-35676
D.C. No. CV-97-00335-TSZ

KATURIA E. SMITH; ANGELA ROCK; MICHAEL PYLE,
for themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

UNIVERSITY OF WASHINGTON, Law School; WALLACE D. LOH; SANDRA MADRID; RICHARD KUMMERT; MICHAEL TOWNSEND; ROLAND HJORTH,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
February 11, 2004—Seattle, Washington

Filed December 20, 2004

Before: Dorothy W. Nelson, Andrew J. Kleinfeld, and
Raymond C. Fisher, Circuit Judges

Opinion by Judge Fisher

OPINION

FISHER, Circuit Judge.

Plaintiffs Katuria Smith, Angela Rock and Michael Pyle are white Washington residents who claim that the University of Washington Law School (the "Law School") rejected their applications because of the Law School's unconstitutional consideration of race and ethnicity as factors in its admissions program. They appeal the judgment the district court entered against them following a bench trial.

The question presented is a narrow one due in part to external events that have overtaken this particular litigation. First, the Supreme Court last year ratified our earlier holding in this case that educational diversity constitutes a compelling state interest. *Smith* v. *Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200-01 (9th Cir. 2000); *see Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244, 268 (2003). In addition, after plaintiffs filed this lawsuit, Washington residents approved a voter initiative in 1998 prohibiting the kind of race-based affirmative action plan at issue here, thereby mooting the plaintiffs' injunctive and declaratory claims, which the district court dismissed. *See Smith*, 233 F.3d at 1192, 1201. Thus, left for us to decide is whether the Law School's admissions program was narrowly tailored to meet the compelling interest of educational diversity during the three years in which the plaintiffs applied—1994, 1995 and 1996—in order to determine whether the plaintiffs might be entitled to damages.

In support of their claim that the Law School's admissions program was not narrowly tailored, the plaintiffs cite three specific aspects of the program during the relevant years: (1) a so-called "ethnicity substantiation letter" that the Law School sent only to some minority applicants; (2) that Asian Americans were given a plus; and (3) a large number of white applicants were referred to the Admissions Committee rather than being directly admitted by an administrator. We hold that none of these aspects of the Law School's affirma-

tive action program undermines the district court's finding that the Law School narrowly tailored its consideration of race and ethnicity in order to meet the compelling interest of obtaining the educational benefits of diversity. Accordingly, we affirm the district court judgment in favor of the Law School.

I.

We summarize below the district court's most relevant findings of fact. Although the plaintiffs appear to contest some of these findings, at least in part, they have not established that the findings are clearly erroneous.[1]

During each of the years in question, the Law School received about 2,000 applications for approximately 165 positions. The top 250 to 300 candidates based on an index score (a weighted tabulation of the applicant's undergraduate grade point average ("GPA") and Law School Admission Test ("LSAT") score) were considered "presumptive admits," whereas the remaining applicants were considered "presumptive denies."

All the presumptive admit applications were read by Kathy Swinehart, the Law School's admissions coordinator, who either admitted applicants or referred their applications to the Admissions Committee for further consideration. Sandra Madrid, assistant dean and liaison to the Admissions Committee, reviewed almost all the presumptive deny applications and could admit, deny or refer applicants to the Admissions Committee for further review. Professor Richard Kummert, the Admissions Committee chairman during the relevant times, oversaw Swinehart's and Madrid's decisions. After Kummert, Madrid and Swinehart completed their work,

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[1] The plaintiffs' arguments at times appear implicitly to challenge certain findings, but they have failed to make explicit their disagreements with any specific finding. *See Armstrong* v. *Davis*, 275 F.3d 849, 860 (9th Cir. 2001) (requiring that party identify "specific errors" in findings of fact).

the Admissions Committee ranked the 250 to 300 or so applications that the trio had identified as requiring committee referral, and the committee's top picks were offered admission.

The Law School did not establish any racial quotas, targets or goals for admission or enrollment. Nor is there evidence that the Law School sought to exclude whites from consideration for seats offered to minority applicants or otherwise applied significantly disparate standards to applicants of different races. The Law School did, however, consider racial and ethnic origin, among many other diversity factors, as a "plus" in its admissions decisions. The amount of preference given to a candidate due to his or her race or ethnicity differed depending on his or her race or ethnicity, *e.g.*, Asian American applicants were given a preference lesser in magnitude than that given to African American candidates.

Although race and ethnicity were the most significant factors in the admissions decisions next to the index score, non-racial diversity factors also played a substantial role in admissions decisions. These factors included cultural background, activities or accomplishments, career goals, life experiences (such as growing up in a disadvantaged or unusual environment or with a physical disability) or special talents. No attempt was made to define the weight that could be accorded to any diversity factor; the weight sometimes changed as the pool was reviewed. This consideration of non-racial diversity factors explains in part why the Law School admitted whites scoring at or below every index score level from which minorities were admitted, and why more whites were admitted than any other group in the group of applicants with index scores below the median for the entire applicant pool.

Procedural History

The plaintiffs filed this action on March 5, 1997, alleging that the Law School had discriminated against them on the basis of race in violation of 42 U.S.C. §§ 1981, 1983 and 2000d. In 1998, Washington voters passed Initiative 200,

precluding certain state actors from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin. *See* Wash. Rev. Code § 49.60.400. The district court on February 10, 1999, dismissed the plaintiffs' requests for declaratory and injunctive relief, as Initiative 200 rendered them moot. We affirmed on appeal, and also held that colleges and universities may consider race or ethnicity in admissions in furtherance of the compelling interest in educational diversity. *Smith*, 233 F.3d at 1197-1201. Accordingly, we remanded the case to the district court for a trial of the individual plaintiffs' claims for liability.

The district court conducted a bench trial from April 8 to 12, 2002, and issued its decision on June 5, 2002, finding for defendants on all claims. Judgment was entered on June 19, 2002. Plaintiffs timely appealed, but we deferred briefing until the Supreme Court decided *Grutter* and *Gratz*. We have jurisdiction under 28 U.S.C. § 1291.

II.

The plaintiffs challenge the district court's conclusion that the Law School's admissions program was narrowly tailored to further its compelling interest in obtaining the educational benefits that flow from a diverse student body. The district court's findings of fact are reviewed for clear error. *See Zivkovic* v. *S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). A district court's conclusions regarding the sufficiency of the facts in meeting strict scrutiny are reviewed de novo. *Hunter* v. *Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063 (9th Cir. 1999).

Racial classifications imposed by government are subject to review under strict scrutiny and thus are constitutional only if they are narrowly tailored to further compelling government interests. *Grutter*, 539 U.S. at 326. Context matters when reviewing race-based governmental action. *Id.* at 327. "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework

for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.* The Law School bears the burden of demonstrating that its consideration of race and ethnicity in its admissions decisions was narrowly tailored to serve a compelling interest. *See Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 377 F.3d 949, 989 (2004). In assessing whether the Law School has met this burden, however, we must assume that it acted in good faith in the absence of a showing to the contrary and defer to its educational judgments. *See Grutter*, 539 U.S. at 328-29.

Because the Supreme Court has provided in *Grutter* an example of a narrowly tailored admissions program, we first turn to that opinion as establishing a template of what educational institutions should do and measure the Law School's program against that approved in *Grutter*. *See Parents Involved*, 377 F.3d at 965 (discussing *Grutter*'s compelling interest analysis); *id.* at 976 (discussing *Grutter*'s narrow tailoring analysis).

A. *Grutter*

The University of Michigan Law School ("UMLS") employed a "Harvard-type" admissions process, of the kind Justice Powell described approvingly in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 317-19 (1978) (opinion of Powell, J.).[2] Admissions officials were required

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[2] Justice Powell described a Harvard-type program, based on that of Harvard College, as follows:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.
>
> * * *
>
> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last

to evaluate each applicant based on all the information available in the file. *Grutter*, 539 U.S. at 315. Admissions officials were to look at and beyond the GPA and LSAT scores, to so-called "soft variables," such as the quality of the recommendations, the undergraduate institution and the applicant's essay. *Id.* The policy also provided that diversity contributions were entitled to "substantial weight," and that there were many possible bases for diversity admissions. *Id.* at 316.

As part of its diversity admissions, UMLS sought to enroll a "critical mass" of underrepresented minority students—targeting African Americans, Hispanics and Native Americans—to ensure that students of these races had the ability to make unique contributions to the law school. Evidence was presented that membership in certain minority groups was "an extremely strong factor in the decision for acceptance," and that applicants from these minority groups were "given an extremely large allowance for admission." *Id.* at 320. Race or ethnicity was not the predominant factor in the Law School's admissions calculus, however. *Id.*

The Supreme Court held that UMLS had established a compelling interest because "attaining a diverse student body is at the heart of [UMLS]'s proper institutional mission." *Id.* at 329; *see also Parents Involved*, 377 F.3d at 964 ("*Grutter* plainly accepts that constitutionally compelling internal edu-

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available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

438 U.S. at 317-18.

cational and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions."). Justice O'Connor, writing for the majority, identified two primary benefits of a diverse student body. First, the educational experience itself is greatly enriched by having diverse members. A diverse student body "promotes cross-racial understanding"; "helps to break down racial stereotypes"; "enables [students] to better understand persons of different races"; results in a "livelier, more spirited, and simply more enlightening" classroom discussion; and "better prepares students for an increasingly diverse workforce and society." *Id.* at 330 (internal quotation marks omitted). Second, the Court recognized that "access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogenous society may participate in the educational institutions that provide the training and education necessary to succeed in America." *Id.* at 332-33. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332.

The Court also concluded that UMLS's attempt to enroll a critical mass of underrepresented minorities was proper because the "concept of a critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id.* at 330. Notably, the need for a critical mass is *not* premised "on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Id.* at 333 (internal quotation marks omitted). Indeed, "diminishing the force of such stereotypes is both a crucial part of [UMLS]'s mission, and one that it cannot accomplish with only token numbers of minority students." *Id.*

Having held that UMLS had a compelling interest in obtaining a critical mass of underrepresented minority students in order to secure the benefits of a diverse student body, the

Supreme Court then turned to the question at issue here—whether the means by which UMLS attempted to obtain a diverse student body were constitutional. In approving the UMLS program, the Supreme Court discussed five hallmarks of a narrowly tailored affirmative action plan: (1) the absence of quotas; (2) individualized consideration of applicants; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point. *See id.* at 335-43. *Compare Parents Involved*, 377 F.3d at 968 (deriving six "constraints" from *Grutter* and *Gratz*).[3]

The Supreme Court first concluded that UMLS's attempt to reach a critical mass of underrepresented minority students did not operate as a quota. *Grutter*, 539 U.S. at 335-36. In addition, the varying percentages of underrepresented minority students, from 13.5 to 20.1 percent, indicated that UMLS did not employ a quota. *Id.* at 336. The Court defined a quota as (1) reserving a fixed number or proportion of opportunities—which must be attained and cannot be exceeded—

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[3] The sixth "constraint" cited in *Parents Involved* is that the "use of race must be *neither mechanical nor conclusive*," *Parents Involved*, 377 F.3d at 968; in other words, there can be "no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single 'soft' variable." *Grutter*, 539 U.S. at 337. This factor is subsumed within the requirement of individualized consideration of applicants. *See id.* (discussing the lack of such automatic acceptance or rejection in concluding that UMLS "engages in a highly individualized, holistic review of each applicant's file"); *see also* HARVARD UNIVERSITY CIVIL RIGHTS PROJECT, A JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 8 (2003) (identifying five narrow tailoring inquiries under *Grutter* and *Gratz*) *available at* http://www.civilrightsproject.harvard.edu/ (last visited August 14, 2004).

for certain minority groups; and (2) insulating individuals from comparison with all other candidates for the available seats. *Id.* at 335. By contrast, a "permissible goal" requires only a good faith effort to come within a range demarcated by the goal and permits consideration of race or ethnicity as a "plus" factor in any given case while still ensuring that each candidate competes with qualified applicants of other races and ethnicities. *Id.*

The Supreme Court next approved of UMLS's "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Grutter*, 539 U.S. at 337. It contrasted the admissions system found unconstitutional in *Gratz*, noting that UMLS "awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.* (citing *Gratz*, 539 U.S. at 271-72). That UMLS "frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants" who are rejected "shows that [UMLS] seriously weighs many other diversity factors besides race that can make a real and dispositive difference." *Id.* at 338.

For a third element, narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. It "does not require exhaustion of every conceivable race-neutral alternative," nor that a university "choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Id.* The Court rejected alternatives the plaintiffs had suggested—such as a lottery system or decreased emphasis on numbers—because they would "require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both." *Id.* at 340.

Narrow tailoring also requires that a race-conscious admissions program not unduly harm members of any racial group. *Grutter*, 539 U.S. at 341. The Supreme Court concluded that

UMLS's program did not unduly harm members of any racial group because it considered "all pertinent elements of diversity" and thus "can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants." *Id.* (internal quotation marks omitted).

Finally, race-conscious admissions programs must be limited in time, such as by sunset provisions or periodic reviews to determine whether the preferences remain necessary. *Id.* at 342-43. The Court accepted UMLS's word that it would terminate its race-conscious admissions program as soon as practicable. *Id.* at 343 (citing *Bakke*, 438 U.S. at 317-18 (presuming good faith of university officials in the absence of a showing to the contrary)). Having determined that the UMLS admissions program met the five criteria discussed above, the Court held constitutional UMLS's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343.

In contrast to UMLS's constitutional program, the Court concluded that the University of Michigan's College of Literature, Science and the Arts ("LSA") admissions program was not narrowly tailored because it "automatically distributes 20 points, or *one-fifth of the points needed to guarantee admission*, to every single 'underrepresented minority' applicant solely because of race." *Gratz*, 539 U.S. at 270 (emphasis added). Justice O'Connor, in her concurring opinion, underscored the difference between the UMLS and LSA admissions programs. "The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis," whereas the LSA "relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant," and the selection index score "by and large automatically determines the admissions decision for each

applicant." *Id.* at 276-77 (O'Connor, J., concurring) (emphasis in original). The policy thus precluded consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity would make to the diversity of the student body.

B. The Law School's Admissions Program

In light of the criteria the Supreme Court has now articulated, we hold that the district court correctly concluded that the Law School's admissions program during 1994-96 "was narrowly tailored to achieve the compelling state interest of educational diversity." Like UMLS in adopting the program described in *Grutter*, the Law School here acted in good faith to implement a Harvard-type admissions process of the kind Justice Powell described approvingly in *Bakke*, 438 U.S. at 317-19, and did so consistent with the hallmarks described in *Grutter*.

The Law School did not establish quotas, targets or goals for admission or enrollment of minorities. Indeed, the two deans of the Law School during the relevant period testified that they did not direct the admissions staff to admit a certain number of minority applicants. Further, the percentage of minorities varied each year in a manner inconsistent with the existence of a quota.[4] *See Grutter*, 539 U.S. at 336.

In addition, the Law School's review of applications demonstrates the sort of "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment" approved of in *Grutter*. 539 U.S. at 337. Applications were divided according to index score. Almost all the top applicants were given offers, unless Swinehart believed the applicant had less academic potential than other

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[4] The numbers ranged from a high of 38.5 percent of admittees and 43.3 percent of enrollees in 1994 to a low of 24.7 percent of admittees in 1998 and 24.4 percent of enrollees in 1996.

presumptive admits, in which case she referred the applicant to the Admissions Committee for further review. The rest of the applicants had to pass the scrutiny of Madrid, the committee or both. These applicants were measured against each other, taking into account all the ways that an applicant might contribute to a diverse educational environment, including that applicant's racial or ethnic minority status. In applying the admissions policy, the reviewers testified that they looked at the whole person for life experiences that most applicants did not possess, trying to imagine that person in the school and what contributions to class diversity they could make.

The Law School also accepted nonminority applicants with grades and test scores lower than underrepresented minority applicants who were rejected, thus showing that the Law School "seriously weigh[ed] many other diversity factors besides race that [could] make a real and dispositive difference." *Grutter*, 539 U.S. at 338. The district court found that nonracial "diversity factors played an important role in the Law School's admissions decisions in all years for all applicants." The consideration of diversity factors other than race and ethnicity further suggests that the admissions program did not unduly harm members of any racial group. *See Grutter*, 539 U.S. at 341. Finally, although the Law School program did not have a sunset provision, the residents of the state of Washington mooted any challenges to this aspect when they passed Initiative 200, prohibiting certain state actors, including the Law School, from considering race or ethnicity in administering state programs.

In sum, the Law School's admissions program comported with the criteria set forth in *Grutter*. Moreover, unlike the program found unconstitutional in *Gratz*, the racial and ethnic pluses here did not "ha[ve] the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant." *Gratz*, 539 U.S. at 272 (quotation marks and elipses omitted). Instead, the Law School's consideration of race and ethnicity was flexible,

"consider[ing] the diversity qualifications of each applicant, including race [and ethnicity], on a case-by-case basis." *Id.* at 276 (O'Connor, J., concurring).

The plaintiffs, however, attempt to differentiate the Law School's program from UMLS's, focusing on three discrete aspects of the admission process. Specifically, they complain that during one or more of the relevant years, the Law School (1) provided an opportunity to some minority applicants to supplement applications through a so-called "ethnicity substantiation letter"; (2) gave a slight "plus" to Asian American applicants; and (3) referred a high number of white applicants to the Admissions Committee. We address each of these practices in turn, but conclude that none of them is inconsistent with the Law School's effort to narrowly tailor its affirmative action program.

1. The Ethnicity Substantiation Letter

Contrary to the plaintiffs' claim, the so-called "ethnicity substantiation letter," as it has been referred to in this lawsuit, supports rather than undermines the constitutionality of the Law School's program. As the district court properly concluded, the Law School used the letter to more narrowly tailor the awarding of a plus for an applicant's race or ethnicity by seeking more information about the role that race or ethnicity played in the applicant's life, rather than simply relying on the applicant's minority status as such. The Law School sent the letter to some applicants who identified themselves as racial or ethnic minorities on the front page of their applications. To help ascertain whether the applicant's race or ethnicity should be considered a plus factor, the letter asked the applicant to provide additional information on "family background (including country of origin), languages spoken, official or government status (for Native Americans), and cultural activities and associations." This was the only letter the school used to seek additional information. Madrid testified that replying to the letter did not guarantee admission; but if the applicant responded, Madrid considered the

new information and, as with all applicants, admitted some, referred some to committee and denied others. When applicants did not respond, the file was reviewed as it had been received. In light of this evidence, the district court concluded:

> The Law School further narrowed its use of race by using the ethnicity substantiation letter to better determine which minority students would fulfill the goal of creating a pool of students with diverse backgrounds. The ethnicity substantiation letter allowed the Law School to give preference to those minority students whose race had impacted their views and experiences rather than giving preference to students based on their race alone. Thus, the program was designed to be sufficiently flexible to give more weight to those minority candidates who had more to contribute to the diversity of the classroom.

The plaintiffs argue against this conclusion, first by noting Madrid's testimony that the Law School would examine the application "as is," without any supplementation, if a minority applicant chose not to respond to the Law School's request. They also point to two minority applicants who were sent an ethnicity substantiation letter and who were admitted despite a "perfunctory" response from one applicant and no response from the other. That these two applicants were admitted in the absence of a meaningful response to the ethnicity substantiation letter proves little, however. That their or other non-responsive applicants' chances of admission might have been even better had they responded does not mean that the letter was an inappropriate effort to obtain additional relevant information. Moreover, the history of the two applicants proves nothing about what happened to other minority applicants who either did or did not respond to the letter nor impeaches Madrid's testimony that there was no pattern to the responses to the ethnicity substantiation letter or the letter's effect on who was admitted.

The plaintiffs also complain that white candidates did not receive the same opportunity to supplement their applications. We reject the assumption that the Law School, in adopting a technique to obtain supplemental information about a class of applicants in order to narrowly tailor the category of those who warranted a racial-ethnic diversity plus, had to apply that technique to all applicants.[5] There was no need to seek further substantiation from nonminority applicants who could not receive such a plus. Moreover, this selective inquiry did not unduly harm white applicants. The Law School directed all applicants to write a 700-word essay addressing their potential contributions to diversity.[6] [ER 180, 2165.] The record also indicates that white applicants could supplement their files on their own initiative.[7]

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[5] Although the plaintiffs contend that the ethnicity substantiation letter was intended to obtain information about nonracial forms of diversity from minority applicants, the letter does not compel such a reading, and the district court, after hearing extensive testimony and weighing copious evidence, accepted the Law School's statement of its limited purpose.

[6] The application stated:

> Important academic objectives are furthered by classes comprised of students having talents and skills derived from diverse backgrounds. Identify in your own words factors such as racial or ethnic origin, cultural background, activities or accomplishments, career goals, living experiences, such as growing up in a disadvantaged or unusual environment or with a physical disability, or special talents that you believe would contribute to the diversity of the law school community. Please include a separate sheet and limit your response to 700 words.

[7] The record includes an application where a white applicant who was placed on the wait list submitted "additional information which might be helpful as [the Law School] evaluated the status of [her] application." She submitted a three-page letter describing her recent work as a teaching assistant and a one-page listing of scho-

Assuming the good faith of the Law School in the absence of evidence to the contrary, *see Grutter*, 539 U.S. at 329, we agree with the district court that the Law School properly sought to provide meaningful racial or ethnic pluses by seeking more information about minority candidates' backgrounds, thereby helping to narrowly tailor its program. In so doing, the school avoided awarding the type of automatic, decisive bonus that *Gratz* found unconstitutional. *Gratz*, 539 U.S. at 271-72.

2. The Asian American Plus

The plaintiffs suggest that Asian Americans, who were given a slight plus for racial diversity, should not have been given a plus at all because the Law School could have attracted what the plaintiffs deem a "critical mass" of Asian American students without a preference.[8] With the plus, Asian Americans constituted 18 percent of admitted applicants in 1994 and 14 percent in 1995 and 1996. Asian Americans would have constituted approximately 7 to 9 percent of the class without any racial or ethnic diversity factor.

This argument suffers from several problems. As an initial matter, it assumes that the category "Asian American" is homogenous. In reality, applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan and the People's Republic of China—to name a few countries of origin from which the Law School specifically sought applicants—have different cultures, backgrounds and languages, and thus would bring different experiences to the educational environment. The Law School, with its preeminent Asian law program, was particularly interested in achieving such diversity among its Asian Ameri-

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lastic honors she had received. This additional information apparently was made part of her file.

[8] We use the Law School's "Asian American" terminology, but note that this group included nationals of other, Asian countries as well as American nationals.

can students. This "educational judgment that such diversity is essential to its educational mission is one to which we defer." *Grutter*, 539 U.S. at 328. As the Supreme Court observed, "the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id.* at 330.[9]

In any event, assuming that Asian Americans should be treated as a homogenous group for the purposes of defining a critical mass, the plaintiffs have not provided any support for their theory that a critical mass is achieved whenever a particular group comprises 7 to 9 percent of the student body. *Grutter* did not establish such a cap. The Court cited testimony that "there is no number, percentage, or range of numbers or percentages that constitute critical mass." *Id.* at 318. It also noted that UMLS's "interest is not simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Id.* at 329 (internal quotation marks omitted). Indeed, defining critical mass in terms of specific percentages "would amount to outright racial balancing, which is patently unconstitutional." *Id.* at 330; *see also Smith*, 233 F.3d at 1197 ("Pure (or, if you will, impure) percentages used for their own sake are not proper.").[10]

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[9] The majority in *Grutter* addressed critical mass in terms of UMLS's "goal of attaining a critical mass of underrepresented minority students," 539 U.S. at 335, rather than looking to whether UMLS had sought a critical mass of each group. *See id.* at 336.

[10] For the same reasons, we reject the plaintiffs' broader contention that the Law School failed to demonstrate "why the benefits of diversity required such a high proportion of the class to be racial and ethnic minorities." The combined total of the racial and ethnic minorities is well within the critical mass deemed acceptable in *Grutter*, where UMLS provided a plus only to African Americans, Native Americans and Hispanics. 539 U.S. at 316.

We also note that relying on percentages to define a critical mass may be distortive, particularly when dealing with small numbers. Here, for instance, 7 to 9 percent of the Law School's 170-person class would be approximately 12 to 15 students.[11] By contrast, 7 to 9 percent of UMLS's 350-person class would be approximately 25 to 32 students. Although the percentages are the same, the difference in actual numbers—12 to 15 as opposed to 25 to 32—may be more important when considering that the goal of a critical mass is to provide for meaningful numbers, or meaningful representation, such that minority students are encouraged to participate in the classroom and not feel isolated. *See Grutter*, 539 U.S. at 318; *Bakke*, 438 U.S. at 323 (opinion of Powell, J.) ("[Ten] or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States.").

In sum, the Law School program was not unconstitutional simply because Asian Americans might have comprised 7 to 9 percent of the class in the relevant years in the absence of a racial or ethnic plus. *Grutter* explicitly refrained from setting a cap on what could constitute a critical mass, and we defer to the Law School's educational decision to award a racial or ethnic plus to Asian Americans in order to enroll a sufficiently large and diverse group of Asian Americans.

3. Referral of Some White Applicants to the Admissions Committee

The plaintiffs contend that the Law School created "separate tracks" for white and minority applicants, pointing pri-

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[11] We note that the Law School estimated that if race had been eliminated as a factor in admission, and if application and enrollment rates had remained the same, entering classes would have been 1 to 3 percent Hispanic (2 to 5 students), 0 to 2 percent African American (0 to 3 students), 0 to 1 percent Native American (0 to 2 students) and 0 to 1 percent Filipino (0 to 2 students).

marily to the referral in 1994 of white applicants with index scores of 195 and 196 to the Admissions Committee but also to the larger proportion of white applicants referred to the committee rather than directly admitted over all the relevant years. We first address the referral process followed in 1994.

a. The Referral of White Applicants with 195 and 196 Index Scores to the Admissions Committee in 1994

In 1994, the Law School drew the line between "presumptive admits" and "presumptive denies" at 197 and above for the former and 194 and below for the latter, with applicants scoring 195-196 considered a "discretionary" group. Madrid was responsible for initially reviewing the presumptive denies and could admit, deny or refer applicants to the Admission committee for further review.

The entire discretionary group—which consisted of 158 applicants, 136 of whom were white—was supposed to be sent to the Admissions Committee without any review by Madrid, as part of the Law School's efforts to ensure that the committee would have approximately 300 applications to assess. Madrid pulled out the 22 applications from minority applicants, however, in order to make an expedited, albeit not necessarily favorable decision on these strong minority applicants in order "to actively recruit those candidates" who were admitted. She admitted 18, referred three to the Admissions Committee and denied one.

The district court noted that "this separate treatment of the minority applicants with an index score of 195-196" was "troublesome on it face," but found that the Law School provided a reasonable explanation for doing so and that the separate review did not interfere with the Law School's ability to provide appropriate consideration of the white applicants. First, the reason for not including the 22 minority files with the 136 applications reserved for committee review was that the Law School wanted to "make an early decision on minor-

ity candidates who were extremely well qualified based solely on their high index scores." Kummert explained that:

> Our purpose there was to acknowledge the fact that for persons of color these qualifications are very rare throughout the general population applying to law school, that if we are to have a serious opportunity of trying to have them actually enroll at the law school that we had to try to communicate our eagerness by promptly admitting them and therefore not wait through the process basically of the group of applications that would come out of the admissions committee. It would tend to be about a month later.

As it later developed, the school's accelerated review strategy did not succeed, because only two of the admitted minority applicants with index scores of 195 and 196 accepted. Thus, the school abandoned the concept of a special discretionary group after 1994. In 1995 and 1996, Madrid reviewed all applications in the presumptive deny category, relying on her ability to act with alacrity on any applications when she thought speed was necessary.

Second, the 136 applicants Madrid referred directly to the Admissions Committee received a thorough, individualized consideration by the committee, even though Madrid did not herself provide a first review of those files. Indeed, the percentage of white applicants with 195-196 index scores who were admitted in 1994 as a result of committee review (29%) was approximately the same in all other years when Madrid reviewed the files initially (28%). In Madrid's review of the 22 minority applicants in the 195-196 group, she assessed them not in isolation, but only in conjunction with the more than 2,000 other white and minority presumptive denies in the 194 and below range.

We accordingly find no merit in the plaintiffs' argument that separating and accelerating the review of the applications of minorities with relatively high index scores was unconstitutional. The Law School simply sought to achieve the com-

pelling interest of diversity by taking steps to increase the prospects of actually enrolling qualified minority applicants rather than risk losing them to other law schools. Moreover, *Grutter* does not require that a single reviewer evaluate all files, just that all applicants receive an individualized review. Because the Law School subjected both white and minority applicants to the highly individualized and holistic review discussed previously, and did not use these separate procedures to set aside any seats for minority applicants or utilize quotas, we conclude that Madrid's processing of the discretionary 195-196 group did not make the 1994 admissions program unconstitutional.

b. The Referral of White Applicants With Index Scores of All Ranges to the Admissions Committee

Plaintiffs finally argue that the admissions program was unconstitutional because in each of the years 1994 through 1996 the Admissions Committee's pool of applicants resulting from Swinehart's and Madrid's referrals (as opposed to direct admissions) was consistently predominantly white. Over the three years, Swinehart—reviewing the presumptive admit category—referred 60 applicants to the committee, 57 of whom were white; she directly admitted 743 applicants, 646 of whom were white. In the same period, Madrid—reviewing the presumptive denies—referred 860 applicants, 782 of whom were white.[12] Of the applicants Madrid admitted directly, 76 of 415 were white.[13] Plaintiffs focus primarily on Madrid's referrals.

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[12] These numbers include the 136 white applicants in the discretionary group automatically referred to the Admissions Committee in 1994.

[13] The plaintiffs also assert that in 1994 and 1995 African American and Filipino American applicants were never sent to the Admissions Committee, but instead admitted directly. They focus on the years 1994 and 1995 presumably because Filipino American and African American applicants *were* sent to, and mostly rejected

To begin with, the large number of white applicants in the Admissions Committee pool must be viewed in context: white applicants ranged from 69 to 74 percent of the total applicant pool from 1994 to 1996. Thus it is not surprising that the committee pool would be predominantly white. In any event, having examined Madrid's review and decision-making process, the district court found that race was never the sole determining factor in Madrid's decision to admit an applicant. The record supports this finding. As described previously, Madrid provided a thorough, individualistic review for all the presumptive denies as required by *Grutter*, comparing each applicant against the others for the qualities—including racial or ethnic pluses as well as nonracial diversity pluses—that they could bring to the Law School. None of her decisions to admit someone directly was based solely on race, nor did she keep track by race of the number of applicants admitted directly or referred to the Admissions Committee.

Additionally, the Law School put into place a system of checks and balances. Kummert oversaw Madrid's decisions and engaged her in debate when he believed Madrid had recommended admission for less academically promising applicants; any continuing disagreement resulted in the applicant's being referred to the committee. Those applications that were referred to the Admissions Committee received another highly individualistic review, with the benefit of three reviewers and a procedure by which the scores were recalibrated where the scores were too disparate. No applicants—whether reviewed by Madrid only or by Madrid and

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by, the committee in 1996, 1997 and 1998. Eleven Filipino Americans were referred to the committee from 1996 to 1998; just one was admitted. Eleven African Americans were sent in the same time period; two were admitted. Given the dearth of African Americans and Filipino Americans in the pool, the fact that none were referred to the committee in 1994 and 1995 is not evidence of a separate track for those particular minorities.

the Admissions Committee—were "foreclosed from all consideration for [a] seat simply because [they] were not the right color or had the wrong surname"; instead each applicant's "qualifications would have been weighed fairly and competitively." *Grutter*, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 318). In short, nonminority applicants were not unduly harmed by this system of review, and the number of white applicants referred to the Admissions Committee does not establish a constitutional violation.

III.

In conclusion, the Law School's narrowly tailored use of race and ethnicity in admissions decisions during 1994-96 furthered its compelling interest in obtaining the educational benefits that flow from a diverse student body. The district court was therefore correct in entering judgment against the plaintiffs' damages claims. Because we conclude that the Law School's admissions program was narrowly tailored, we need not reach the plaintiffs' other arguments.[14]

AFFIRMED.

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[14] The district court's findings do not establish that any of the plaintiffs would have been admitted to the Law School but for the challenged policy. *See Texas* v. *Lesage*, 528 U.S. 18 (1999).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KATURIA E. SMITH, ANGELA ROCK and MICHAEL PYLE,

Plaintiffs,

v.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, WALLACE D. LOH, ROLAND HJORTH, SANDRA MADRID, and RICHARD KUMMERT,

Defendants.

No. CV-97-335Z

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

Introduction

This matter came on for a bench trial on April 8, 2002 as to issues of liability. Plaintiffs were represented by Michael Rosman, Steven Hemmet and Hans Bader of the Center for Individual Rights and defendants were represented by Michael Madden and Bruce Megard of Bennett Bigelow & Leedom, P.S. At the conclusion of the trial the Court took the case under advisement. The Court has reviewed the testimony of the witnesses at trial, exhibits admitted during trial and the designated deposition testimony of Richard Kummert Vols. I, II and III (253-294), Sandra Madrid (90-134), Joseph Sully and Nat Hentoff. The Court has also considered the

Supplemental Stipulated Facts, filed May 21, 2002, docket no. 329.

Plaintiffs Katuria Smith, Angela Rock and Michael Pyle were unsuccessful applicants to the University of Washington Law School (the "Law School") in 1994, 1995 and 1996, respectively. During these years, it is undisputed that the Law School considered race as one of several diversity factors in making its admissions decisions. Plaintiffs bring claims for damages against the Law School under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits any program or activity receiving federal financial assistance from discriminating on the basis of race, color or national origin. Plaintiffs challenge the admissions system used by the Law School during the years in question. Plaintiffs contend race was improperly considered as a factor in the admissions process. Plaintiffs further contend that even if race could be considered as a factor in the admissions process, defendants did not narrowly tailor the Law School's admissions program to meet a compelling government interest, in violation of federal law. Plaintiffs contend that, but for the use of race as a factor in the admissions program, each of the Plaintiffs would have been admitted to the Law School. Plaintiffs also claim damages under 42 U.S.C. § 1981 and 1983 against individual defendants who were involved in establishing and carrying out the Law School's admissions program during the relevant time periods.

Defendants contend that Plaintiffs are not entitled to any relief because the Law School's policies and practices were consistent with a "Harvard-type" admissions policy, upheld in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). Defendants contend the program was narrowly tailored to meet the Law School's objectives of educational diversity, which is "believed to be relevant to a rich and effective study of the law." Defendants also contend that race was not a factor in the denial of each of the plaintiffs' application to the Law School and none of them would have been

admitted even if race had not been considered in the admissions process.

This Court has previously held that educational diversity is a compelling government interest that meets the demands of strict scrutiny under *Bakke*. *See Smith* v. *University of Washington Law School*, 2 F. Supp.2d 1324 (1998), *aff'd*, 233 F.3d 1188 (9th Cir. 2000). Thus, the Fourteenth Amendment permitted the Law School to consider race in connection with its admissions program prior to the passage of Initiative 200 ("I-200") in the State of Washington in 1998. With the passage of 1-200, Washington now prohibits the granting of "preferential treatment" to any individual "on the basis of race." RCW 49.60.400.

The focus of the trial was to determine whether the Law School's program was narrowly tailored to meet the requirements of *Bakke* for the years in question.

Based on the following Findings of Fact, the Court concludes that the Law School's admissions program was consistent with *Bakke* and judgment should be entered in favor of defendants on all claims.

II.

Findings of Fact

A. *Plaintiffs*

1. Plaintiffs Katuria Smith, Angela Rock, and Michael Pyle are white residents of the State of Washington who submitted complete applications to the Law School in 1994, 1995, and 1996 respectively, prior to the deadlines for applying. Plaintiffs' exhibits 86, 87 and 88 are the Law School's application files for, respectively, Katuria Smith, Angela Rock, and Michael Pyle. Each of the plaintiffs' applications for admission in these years was rejected. Smith attended Seattle University School of Law and graduated in May 1997. Rock attended Georgetown University Law Center and graduated in May 1998. Pyle reapplied to the Law

School in 1999 and was admitted, but chose not to attend. He has no current plans to attend law school.

2. The University of Washington Law School admissions form asked each applicant to disclose his or her race. Each of the plaintiffs identified his or her race by checking the box next to "white."

B. *Defendants*

3. Defendant University of Washington Law School is a state-operated institution which operates as part of the University of Washington.

4. At all times material the Law School received federal funds.

5. Each of the individual defendants was an employee of the Law School during the time in question and acted under color of state law for purposes of 42 U.S.C. § 1983.

6. Defendants Sandra Madrid and Richard Kummert were the individuals primarily responsible for administering the admissions procedures adopted by the Law School. Defendant Madrid was, at all times relevant to this litigation, Assistant Dean and the liaison to the admissions committee. Defendant Kummert is a professor at the Law School. He has been actively involved in the admissions process since 1965. During 1994 to 1998, he was the chair of the admissions committee.

7. Defendant Wallace Loh served as Dean of the Law School during the period in which plaintiffs Smith's and Rock's applications were under consideration. Defendant Roland Hjorth served as Dean of the Law School during the period in which plaintiff Pyle's application was under consideration. Loh was Dean of the Law School until mid-July 1995. Hjorth became Dean in mid-August 1995.

8. The Dean appoints the members of the admissions committee each year.

C. *History of the Law School's Admissions Policies*

9. Prior to the late 1950's, the Law School's admissions system was non-selective. All applicants meeting minimum qualifications were admitted. The open admissions policy applied to applicants of all races. Stipulated Facts, docket no. 318 at ¶ 11 (hereinafter "Stip. Facts").

10. In 1968, the Law School commenced a special program to consider applicants who were members of certain preferred races or ethnicities. The Law School referred to those admitted under this program as "special admissions." Some minorities were admitted with academic credentials that would have led to the rejection of those who were not members of a preferred race or ethnicity. Stip. Facts ¶ 13.

11. The stated rationale of the special admissions program was that

> Certain ethnic groups in our society have historically been limited in their access to the legal profession . . . and the resulting underrepresentation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities . . .

Exhibit 20, p. 14; *See also* Exhibit 21, p. 5.

12. The Law School's admissions policies for the period 1977 to 1989 are described in Exhibits 21-26. During this period of time, the Law School published a policy on admissions (the "Policy") stating that the Law School "gives special consideration to applicants who are members of racial and ethnic minority groups that have been subject to long-continued, pervasive discrimination sanctioned by the legal system and that would not otherwise be meaningfully represented in the entering class." The Policy identified examples of such groups as follows: "Asian Americans, Black Americans, Chicanos, Filipino Americans, Native Americans/Indians, and Puerto Rican Americans." The Policy in effect between 1977 and 1989 stated that membership in

those groups would be considered a positive factor so as to enhance the "diversity" of the student body. The Policy did not identify any other criteria that would enhance the "diversity" of the student body. Exhibits 21-26.

13. In 1989, the Law School reviewed its admissions policy because several constitutional scholars at the Law School had raised questions "regarding language in the [P]olicy or aspects of its administration." Stip. Facts ¶ 17.

14. Prior to 1989, Section 1 of the Policy stated that the Law School sought those individuals who "will contribute to the diversity of the student body and of the legally trained segment of the population." In the memos written by the admissions committee to the faculty in 1989 recommending changes in the Policy, the admissions committee recommended that Section 1 of the Policy be amended to strike the words "and of the legally trained segment of the population." The memos stated that "[t]his is a problematic goal under *Bakke*. As a state institution, we are not permitted to try to give a racial group a specified portion of the entering class, even if this is intended to overcome deficits of that group in the professional population." Stip. Facts ¶ 18; Exhibit A-7

15. In 1989, the Law School faculty voted to change its admissions Policy to conform to *Bakke* by implementing a "Harvard-type" program (The "Amended Policy"). At the same time, the faculty also voted to eliminate any reference to "the legally trained segment of the population."

16. Despite the intent of the Law School to modify its admissions policy, Section 1 of the Amended Policy printed in the Law School's Admissions Bulletin for every year between 1990 and 1998, continued to state that the Law School's policy is designed to promote diversity of *both* the student body *and* the legally trained segment of the population. Stip. Facts ¶ 20; Exhibit 1; Exhibit 45, p. 9. This language remained in the Law School admissions bulletins as a result of oversight by defendants.

17. During the years in dispute in this litigation, 1994-1996, although the Law School's admissions bulletin referred to promoting diversity in the "legally trained segment of the population," this goal was never considered in the admissions process as a goal for admissions to the Law School.

18. In 1989, the Law School faculty also recommended a number of other changes in the Policy, including changes to Section 2, the "academic potential" section, and Section 3, the stated "diversity" section. These recommended changes have appeared in the Admissions Bulletins subsequent to 1989. Stip. Facts ¶ 20; Exhibits 1, 45, p. 9.

19. Beginning in the fall of 1989, Section 2 of the Amended Policy stated that "[i]n measuring academic potential, the Law School relies primarily on the applicant's undergraduate grade point average and performance on the Law School Aptitude Test. . . . For most applicants, the ranking that results is the most nearly accurate measure of relative academic potential." Section 2 also stated that the Law School considers other factors "where numerical indicators do not appear to be an adequate measure of academic potential," and further stated that those other factors include the strength of the candidate's undergraduate institution and course of study, the attainment of advanced degrees, post college experience, recommendations, variation in grades over time, and past social or economic disadvantage or changes in health that might have affected academic performance. Stip. Facts ¶ 20; Exhibits 1, 45, p. 9. Among the "post-college experiences" that the Law School valued as a diversity factor was work experience in an activity suggesting strong analytical ability.

20. Beginning in the fall of 1989, Section 3 of the Amended Policy stated that "racial or ethnic origin" was a "diversity" factor that the Law School would consider in making admissions decisions. Stip. Facts ¶ 21. The Law School has considered race as a factor in admissions since 1989. Pretrial Order, Admitted Facts, ¶ 5. At all times mate-

rial, Section 3 of the Amended Policy provided in its entirety as follows:

> § 3. In selecting the entering class, the Law School does not make all of its admission decisions solely on the basis of predicted academic performance. Important academic objectives are furthered by classes comprised of students having talents and skills derived from diverse backgrounds believed to be relevant to rich and effective study of law. Factors that indicate this diversity include, but are not limited to, racial or ethnic origin, cultural background, activities or accomplishments, career goals, living experiences, such as growing up in a disadvantaged or unusual environment or with a physical disability, or special talents. This list is not exhaustive, and the factors are not of equal weight; moreover, no single factor is dispositive. Furthermore, no factor will confer admission on an academically unqualified applicant.
>
> Applicants are invited to describe these and other aspects of their background that would benefit the diversity of the law school community.
>
> Exhibit A-8.

21. After the adoption of the Amended Policy in 1989, the persons involved in the admissions process met and discussed the changes and how the program should be applied to be consistent with *Bakke*. At all times material, the Law School has considered diversity factors such as "race or ethnic origin, cultured background, activities or accomplishments, career goals, living experiences, such as growing up in a disadvantaged or unusual environment or with a physical disability, or special interests that you believe would contribute to the diversity of the law school community." Application for Admission at Form A ¶ D, Exhibit 45. The Law School concluded that diversity in the classroom is an essential part of a quality legal education, because a broad pool of law students from diverse backgrounds dramatically im-

proves the quality of the educational experience for all law students. The Law School also concluded that racial diversity is an important form of diversity because race has a significant impact on the experiences of people, and the effect of race is particularly important with respect to views and experiences of people of color related to issues of law. Consistent with its purpose of enhancing educational diversity, a significant purpose of the Amended Policy was to decrease emphasis on numeric indicators of qualification to attend law school, i.e., undergraduate grade point average ("GPA") and Law School Aptitude Test ("LSAT") scores, and to increase emphasis on diversity factors and non-numeric indicators of merit.

22. As part of adopting its Amended Policy, the Law School took steps to review admission procedures to avoid overly weighing any diversity factors. The purpose of the review was to arrive at a "common understanding" as to what was considered within and without the protected area. Dean Madrid met with Law School Professors Jay and Kummert informally to discuss the new Amended Policy. Madrid was told and understood that under *Bakke* race could be considered as a diversity factor but could not be a determining factor.

23. The proportion of non-whites in the Law School student body had been between 7% and 18% throughout the late 1980's. That proportion increased dramatically beginning in 1990, the first class to be admitted under the Amended Policy. Stip. Facts ¶ 23.

24. But for two unusual years in which the Law School had an unusually high "yield" from admissions offers to non-white applicants, enrollment of students of color from 1990 to 1998 stayed at about 35% of the entering classes.

25. In April 1994, the Law School faculty voted to raise the number of students in a class from 150 to 165. At the same time, they set a target of from 70-75% for the proportion of a matriculated class that would have the State of

Washington as their residence. Stip. Facts ¶ 24. Residency is considered a "plus" in the admissions process.

26. The Law School is a member of the Association of American Law Schools ("AALS"). Defendant Loh served on the Executive Committee of the AALS from 1992 through 1997. He served as president-elect of the AALS in 1995, president in 1996, and past president in 1997. Stip. Facts ¶ 26.

27. A member law school must fulfill the obligations of membership reflected in the by-laws of the AALS. Exhibit 106, By-Laws § 2-2. One of those obligations is set forth in Section 6-4(c) of the By-Laws, which states that "[a] member school *shall* seek to have a faculty, staff and student body which are diverse with respect to race, color and sex." *Id.* (Emphasis added).

28. In February 1996, an inspection of the Law School was conducted by a team from the AALS and the American Bar Association ("ABA") for purposes of AALS membership compliance and ABA re-accreditation. In preparation for that inspection, the Law School created two sets of documents: a self study and answers to a site-evaluation questionnaire. The site-evaluation questionnaire required responses to a series of questions; the self-study was an evaluative document that was written after a series of faculty colloquia. Stip. Facts ¶ 27.

29. Exhibits 18 and 48 were part of the Law School's self-study addressing the areas of "Admissions" and "Programs For Promoting Opportunities For Racial And Ethnic Minorities"; Exhibits 19 and 49 were part of the Law School's answers to the site-evaluation questionnaire covering those same topics. These documents describe how the Law School attempted to increase minority enrollment. Stip. Facts ¶ 28.

30. Exhibit 49, entitled "Programs For Promoting Opportunities for Racial And Ethnic Minorities," stated in part that the Law School "maintains one of the most progressive and

outstanding minority admissions programs in the nation." Exhibit 49, SEQ XV-1. The Law School also extolled the "increase of over 100% in the amount of minority students admitted and enrolling at the Law School" since the last accreditation process. Exhibit 49, SEQ XV-1; *id.* at SEQ XV-9 ("commendable results").

31. The Law School attempted to increase minority enrollment through methods other than admission preferences. The Law School sought to recruit qualified minorities through a variety of pre- and post-application programs.

D. *The "Ethnicity Substantiation Letter"*

32. At all times material "race or ethnic origin" was a positive factor under the Law School's admissions policy. The admission application contained the question, "What race do you consider yourself to be in?" Application for Admission Form A, Exhibit 45. The form asked applicants to answer regardless of the person's citizenship status.

33. The Law School sometimes sent a form "ethnicity substantiation" letter to applicants who marked the "racial or ethnic origin box" on the front of the application. The letter stated that the information provided in the application was insufficient and asked the applicant to provide additional information on "family background" and "cultural activities and associations." *See* Letter, Exhibit 35.

34. This was the only letter the Law School used to seek additional information about an applicant's diversity.

35. The Law School did not ask any applicant for any additional information concerning their background unless the applicant had indicated that he or she was a member of a minority race.

36. Each of the plaintiffs in this case indicated in their application that they were a member of the white race; none of the plaintiffs received the form ethnicity substantiation letter in connection with their applications for admission to the Law School. None of the plaintiffs received any other re-

quest from the Law School for additional information concerning their background so the Law School could better assess their diversity. Stip. Fact ¶ 35.

37. Plaintiff Smith contends that if she had been asked for more information on race, she would have disclosed that she was very poor, that neither her mother nor 2 sisters had graduated from high school, and that she had just discovered she was 1/8 Cherokee. Plaintiffs Rock and Pyle do not contend they should have been asked for additional information or that they had any additional information to provide concerning their race or ethnic background.

38. The Law School application filled out by each of the plaintiffs required a personal statement. The application explained that this statement was important for the following reasons:

> Important academic objectives are furthered by classes comprised of students having talents and skills derived from diverse backgrounds. Identify in your own words factors such as racial or ethnic origin, cultural background, activities or accomplishments, career goals, living experiences, such as growing up in a disadvantaged or unusual environment or with a physical disability, or special talents that you believe would contribute to the diversity of the law school community. Please include a separate sheet and limit your response to 700 words.

Exhibit 45.

39. In plaintiff Smith's personal statement, attached to her application, she did not disclose additional information about her race or ethnic background or how she thought she would contribute to the diversity of the law school community. *See* Smith Personal Statement, Exhibit 86 at 990701.

E. *The Application Process - In General - Years 1994-1996*

40. The applications deadline to the Law School for the years 1994-1996 was January 15.

41. All applicants with valid LSAT scores and an undergraduate GPA were assigned an index score by the Law School Admission Council ("LSAC"). The index score was a composite of a student's undergraduate GPA and LSAT score. If the student had two LSAT test scores in the previous three years, an average of the two was used by the LSAC in calculating the index. On those occasions where the LSAC did not average such scores, for whatever reason, the Law School considered both scores in evaluating the applicant. In both 1994 and 1995, the index was a three-digit number on the scale of 140-213. In those years, the formula for creating the index gave approximately 62% weight to the LSAT and 38% weight to the undergraduate GPA. That formula was 10.7100 x GPA + .9520 x LSAT. Stip. Facts ¶ 37.

42. During the years in question, the Law School received about 2000 applications per year for approximately 165 positions per year. Approximately 250-300 candidates with the highest index scores comprised a "presumptive admit" category of applications. Kathy Swinehart, the Law School's Admissions Coordinator, was assigned to read the applications of the "presumptive admit" candidates. Ms. Swinehart could recommend that applicants from this group be admitted or, alternatively, that they be referred to the admissions committee for further consideration. Her decisions were reviewed by Professor Kummert. She had no authority to recommend denial of a candidate for admission. The cumulative presumptive admit group during the years 1994-1998 was 89% white, 8% Asian, and the remainder made up of various other ethnic minorities. Stip. Facts ¶ 38.

43. Applications by candidates with index scores below the presumptive admit cut off were part of a "discretionary" or "presumptive deny" group and handled in the following manner:

(a) In 1994, white applicants with index scores of 195-96 were referred to the admissions committee without review by the admissions staff. All other files were

read by Dean Madrid, who admitted, rejected, or referred them to the admissions committee. Professor Kummert reviewed her decisions.

(b) In 1995 and 1996, Dean Madrid read all or most files below the presumptive admit cut-off. As before, she admitted, rejected, or referred applications to the admissions committee. Professor Kummert also reviewed Dean Madrid's decisions with respect to these files.

44. The Law School sought to have approximately 250-300 candidates reviewed by the admissions committee each year. The admissions committee did not begin its work of reviewing files until after Madrid, Swinehart and Kummert had finished their work.

45. The admissions committee consisted of six professors and three students. The admissions committee was divided into three subcommittees of three persons each; each subcommittee would review 1/3 of the files, divided alphabetically. Dean Madrid did not participate in the work of the admissions committee. Professor Kummert was chair of the admissions committee and participated on one of the subcommittees. Stip. Facts ¶ 41.

46. Each member of a subcommittee would rank the candidates on a scale of 1-5. Each reviewer was asked to distribute the candidates that they reviewed evenly among the five possible scores so that 20% of the candidates reviewed were given each of the five possible scores. In practice, most reviewers gave less than 20% of the candidates the lowest rank of "1." If there were rankings by individual members of a subcommittee for a particular applicant that differed by two or more points, the subcommittee was instructed to consult one another and reconsider their individual rankings for that applicant. The sum of the individual [sub]committee members' rankings represented a candidate's final "committee rank." *See* Stip. Facts ¶ 42. Exhibit 33 is the ranking sheets for 1995.

47. At the end of March, the Law School would admit a certain number of applicants, based on committee rank. On occasion, offers would be made only to Washington residents among those candidates with a certain committee rank. Stip. Facts ¶ 43.

48. Those with rankings just below the individuals offered admission based on committee rank were offered a position on a wait list. Those given a wait list position had to respond positively to remain on the wait list. Depending on the year, and the yield that the Law School obtained from earlier offers of admission, the Law School would make additional offers of admission from the wait list during the spring and summer. Stip. Facts ¶ 44.

49. Applicants who had received offers were required to accept those offers, and place a deposit with the Law School, before June 1 in order to reserve a place in the incoming class. If the class had not filled by June 1, additional offers would be made from the wait list, based on committee rank and sometimes residency, over the summer months. Stip. Facts ¶ 45.

50. Candidates who had been denied an offer of admission could appeal that decision. Plaintiffs did not appeal their denial of admission to the Law School. Stip. Facts ¶ 46.

51. During the years 1994-98, the admission rates for white and non-white applicants were as follow:

Filipino	34.59%
Native American	28.80%
African American	29.60%
White	22.76%
Hispanic	30.24%
Asian	23.88%

Stip. Facts ¶ 47.

52. The Law School did not establish any racial "quotas," "targets" or "goals" for admission or enrollment.

53. The Law School did not establish any differential score cut-offs based on race. White and minority candidates were considered and admitted within the same levels of index scores. The Law School did not exclude white applicants from consideration at any index score level where minority candidates were considered, and admitted whites at or below every index score level where minorities were admitted. *See* Exhibit A-1 - all cases. In the group of applicants with index scores below the median for the entire group, more whites were admitted than any other group.

54. Defendants did not keep track of the numbers of applicants admitted directly or referred to the admissions committee in any year in question. However, overall the parties have stipulated that the Law School referred to the admissions committee 282 applicants in 1994, 328 applicants in 1995, and 313 applicants in 1996. Supplemental Stipulated Facts, docket no. 329.

F. *The Law School's Admissions Process in 1994 - Plaintiff Smith's Application*

55. Plaintiff Smith applied for admission to the Law School in 1994. Smith's admissions file is Exhibit 86. Smith had an index score of 192. In 1994, applicants with index scores below 194 were considered "presumptive deny" candidates. Stip. Fact ¶ 48. There were 94 applicants with an index score of 192, 18 of whom were admitted in 1994. Exhibit 32. Smith was denied admission to the Law School on or about March 9, 1994. Exhibit 86.

56. Smith's application presents a well qualified applicant for Law School admission. However, the Law School applicant pool for 1994 was extremely well qualified. The Law School experienced an increase in both the number of total applicants and the number of admissions in 1994. There was also a substantial increase of well qualified minority applicants in 1994. A total of 2552 applied (the largest number of applicants ever to apply to the Law School), 546 applicants were offered admission, and a class of 187 was ultimately

enrolled (of which 17 withdrew). Exhibit 7. There were a total of 664 applicants to the Law School with an index score higher than plaintiff Smith's score of 192 in 1994. Exhibit 32. The mean undergraduate grade point in 1994 for persons admitted to the Law School was 3.5 and the mean LSAT was 162. Professor Kummert testified and the Court finds that the 1994 applicant pool was one of the strongest groups ever to apply to the Law School. See Exhibit A-4 for the profile of Law School applicants for 1994.

57. In 1994, the Law School admitted students with index scores ranging from 213 to 166. The "presumptive admit" line in 1994 was set at an Index of 197. A total of 276 candidates with scores between 197 and 213 were considered "presumptive admit" candidates and reviewed by Kathy Swinehart and Dean Kummert. Exhibit A-9, p.5. 265 of these applicants were offered admission directly and 1 1 (nine whites and two Asians) were referred to the admissions committee. Stip. Fact ¶ 49.

58. The remaining 2276 applicants for 1994 are referred to as the "discretionary group," or "presumptive denies" and the majority of these files were reviewed by Dean Madrid. Exhibit A-9 at 8. 292 applicants with scores above Smith's index score of 192 were rejected. These rejected applicants included 281 white applicants and 11 minority applicants. Exhibit 32. Of the 292 rejected white applicants with index scores above Smith's, 157 were denied directly by Dean Madrid. Exhibit A- 15 at 10.

59. There were 1792 applicants with index scores of 192 or lower. 159 applicants with index scores of 192 or lower were admitted. These included 29 white applicants and 130 racial minorities. The remaining 1633 applicants with index scores of 192 or below were rejected. This group included 458 minorities and 1175 white applicants. Exhibit 32. The person admitted with the lowest index score was white with a score of 166. Exhibit 7 at 5.

60. In 1994 Dean Madrid read 2140 of the 2276 files below the "presumptive admit" level. Dean Madrid admitted, rejected or referred these applications to the admissions committee. Professor Kummert reviewed her decisions. Dean Madrid's "read" of these 2140 files took about 10 weeks of reading files, 5-6 hours per day, seven days a week. Madrid would average approximately 11 minutes reviewing each file. Madrid read files from the lowest index score upwards. During this process Madrid admitted 158 persons with three-digit index scores, of which all were minority applicants. Stip. Fact ¶ 52. Madrid also admitted 11 applicants with non-standard index scores, four of whom were white. *Id.* Madrid testified she would not admit anyone who did not have one or more diversity factors. These included race, unusual life experiences, foreign language skills, geography, post-college work, advanced degrees, disabilities, achievements in athletics, business or the military, public service and other diversity factors. Madrid testified that she did not keep track of the race of the applicants she selected for admission or referral. The Court finds that race was never the sole determining factor in Madrid's decision to admit. Rather, she considered race and all other applicable diversity factors.

61. During trial, witnesses reviewed various application files, including each of the plaintiffs' files and provided post hoc testimony about the strength and weaknesses of these files. The Court finds this testimony to be of little weight. It is possible to justify almost any decision after the fact but this testimony is not helpful in determining whether race was a determining factor in admissions decisions at the time.

62. Both Madrid and Kummert reviewed Smith's application in 1994 but have no recollection of that review.

63. During 1994, a total of 136 white candidates and 22 non-white candidates had an index score of 195 and 196, just below the presumptive admit level. Dean Madrid, without any review, referred all 136 white candidates to the admissions committee. Forty of the 136 white applicants were ad-

mitted after ranking by the admissions committee. Stip. Fact ¶ 57. Madrid reviewed the 22 minority candidates with index scores of 195 and 196. Of the 22 minority candidates, Madrid admitted 18, referred 3 and denied 1 applicant from this group. *Id.*

64. Smith objects to the separate treatment of these 136 white candidates. Smith also points to the very high admit level of these minority applicants by Madrid (18 admits out of 22 candidates) as compared to the much lower admit level (40 admits of 136) of candidates sent to the admissions committee. Smith claims this separate treatment is strong evidence of discrimination based on race. Dean Madrid testified and the Court finds that this separate treatment of the 22 minority candidates was for the purpose of making an early decision on minority applicants who were extremely well qualified based solely on their high index scores. Madrid testified the Law School did not want to delay decision on these minority candidates because they might otherwise choose to attend another school. Of the 22 minority candidates in this group, although 18 were offered admission, and 3 were referred to the admissions committee, only 1 Asian and 1 Hispanic candidate accepted. Thus, only 2 positions were taken. Stip. Fact ¶ 51.

65. Although the Court finds this separate treatment of the minority applicants with an index score of 195-196 troublesome on its face, the files were read in conjunction with all other lower scoring non-presumptive admit files and thus were not isolated from comparison with non-minority files. Given their numeric qualifications and the very small number of high scoring minorities in the pool, it was reasonable for defendants to believe that many of these minority candidates would have been ranked in such a manner that they would have received offers of admission had their files been reviewed by the admissions committee. Their consideration in this manner did not systematically exclude whites from any seats, nor did it effectively insulate minorities from compari-

son with whites, given defendants' knowledge of the relative qualifications of applicants in this index group.

66. Additionally, the Court finds that the automatic referral to the admissions committee of the white applicants in this group did not affect their chances of being admitted as compared to similarly situated students reviewed by Madrid. The percentage of students admitted either directly or by the admissions committee from the group of students with index scores 1 or 2 points below the presumptive admit cut-off in 1995 and 1996 when first reviewed by Madrid was 28%. In 1994, 29% of these persons were admitted. Moreover, the referral of the 136 files to the admissions committee did not result in any harm to Smith. The 2 minority applicants who accepted their offers of admission had a substantially higher index score than Smith and were highly qualified applicants.

67. In 1994, 142 minority students received "preferential admits" meaning that race was considered a "plus" for purposes of admission. *See* Exhibit A-15 at 7. Smith asserts that if race had not been considered during the admissions process, she would have been admitted to the Law School in place of one of these 142 students.

68. There were 169 white applicants sent to the admissions committee but denied admission in 1994. In general, the Court finds that persons referred to the admissions committee for review were more qualified than applicants not referred to the committee. Accordingly, the Court finds that the 142 spaces would have been re-allocated among the 169 students remaining in the admissions committee pool and Smith would not have been admitted to the Law School in 1994 under a race neutral policy.

G. *The Law School's Admission Process in 1995 - Plaintiff Rock's Application*

69. Plaintiff Rock applied for admission to the Law School in 1995. Rock's admission file is Exhibit 87. Rock had an

index score of 196. Rock was a "presumptive admit" applicant in 1995 based on her index score.

70. In 1995, Ms. Swinehart continued to review candidates in the presumptive admit group, with oversight by Professor Kummert. The presumptive admit group in 1995 consisted of Washington residents with index scores of 196 or higher, and non-residents with index scores of 197 or higher. This group consisted of 252 applicants, identified in the database as follows: 218 whites, 26 Asians, 5 Hispanics, 1 Native American, 1 African American, and 1 Filipino. Stip. Fact ¶ 54.

71. Swinehart referred 26 white candidates (eight of whom were Washington residents, including Angela Rock) in the presumptive admit category in 1995 to the admissions committee. These candidates received committee scores of between 5 and 15. Four of those referred were offered admission (three residents with committee scores between 12-14 and one non-resident with a score of 15). Stip. Fact ¶ 57.

72. Angela Rock received a score of 10 from the admissions committee. Exhibit 33. She was offered a spot on the waiting list, which she accepted. She was denied admission in August 1995. Stip. Fact ¶ 58. No person having a score of 10 from the admissions committee was admitted in 1995. Exhibit A-15 at 12.

73. Madrid was assigned to review all candidates below the "presumptive admit" category in 1995 and in subsequent years, with oversight by Professor Kummert. Dean Madrid admitted 152 applicants, including 8 Filipino, 14 Native American, 30 African American, 30 White, 34 Hispanic and 33 Asian candidates. One white and one Asian with non-standard or no index scores were also admitted. She referred 302 applicants including 3 Native American, 284 white, 6 Hispanic, and 9 Asian candidates to the admissions committee. Of these 302 candidates referred to the admissions committee, 96 were admitted including 1 Native American, 85 whites, 4 Hispanics, and 6 Asians. The remaining applicants,

including 27 Filipino, 35 Native American, 65 African American, 1128 white, 95 Hispanic, and 332 Asian candidates, were denied by Dean Madrid in 1995, without referral to the admissions committee. Stip. Fact ¶ 60.

74. In 1995, 18 of 22 resident applicants with Angela Rock's index score of 196 were admitted. Stip. Fact ¶ 61.

75. Angela Rock was a presumptive admit candidate in 1995. Race was not a factor in decision-making with respect to presumptive admit candidates and her application was referred to the admissions committee for reasons unrelated to race, including her lack of significant life experiences, weak personal statement, less than strong recommendations and issues concerning specific grades. Rock was given a committee ranking of 10. There is no reason to believe that Angela Rock's committee ranking would have changed under an admissions system giving less weight to the racial or ethnic diversity of other applicants. Exhibit A-15 at 12. Race did not play a substantial role in Rock's denial of admission to the Law School.

H. *The Law School Admissions Process in 1996 - Plaintiff Pyle's Application*

76. Plaintiff Pyle applied for admission to the Law School in 1996. Pyle was a Washington resident.

77. For the admissions process leading to the class that matriculated in the fall 1996, the Law School used a two-digit index on a scale of 00-99. The formula for creating the index in 1996 gave somewhat less weight to the LSAT score (approximately 55%) and somewhat greater weight to the undergraduate GPA (45%) than had the formula used in 1994 and 1995. The revised formula was 6.73 x GPA + .4060 x (LSAT). Stip. Fact ¶ 62.

78. Plaintiff Pyle's index score using this two-digit index was 89. Stip. Fact ¶ 65. In 1996, 28 of 64 resident applicants with an index score of 89 were admitted to the Law School. *Id.*

79. Defendants have identified the presumptive admit group in 1996 as consisting of resident applicants with index scores of 91 or higher, and non-residents with index scores of 92 or higher. 275 candidates were included in this group, made up of 242 whites. 27 Asians, 5 Hispanics and 1 Filipino. 23 candidates (including five Washington residents) were referred to the admissions committee; 22 were white and one was Asian. The group referred to the admissions committee from the presumptive admit group in 1996 received committee scores of between 6-14, and 11 whites received offers of admission. Stip. Fact ¶ 63.

80. In 1996, Dean Madrid read all files below the presumptive admit cut-off. Of the group of 1644 applicants in 1996 with index scores below the presumptive cut-off or with no index score, Dean Madrid offered 112 admission without referral to the admissions committee. This group included 8 Filipinos, 10 Native Americans, 15 African Americans, 41 whites (4 of whom had no index score), 16 Hispanics and 32 Asians (2 of whom had no index score). Dean Madrid referred 290 applicants to the admissions committee. This group included 3 Filipinos, 5 Native Americans, 4 African Americans, 240 whites, 16 Hispanics and 22 Asians. Of this group referred to the admissions committee, 122 were offered admission, including 1 Filipino, 1 Native American, 1 African American, 99 whites, 7 Hispanics and 13 Asians. The remaining 1242 candidates, including 16 Filipino, 17 Native American, 27 African American, 919 white, 52 Hispanic, and 212 Asian, were denied by Dean Madrid in 1996, without referral to the admissions committee. Stip Fact ¶ 64.

81. In 1996, there were 64 preferential admits. There were more than 64 persons referred to the admissions committee but denied admission. The Court finds that the 64 preferential admits would have been re-distributed amongst those who were referred to the admissions committee. Pyle's application was denied without referral to the admissions committee. If race had not been considered by the Law School,

more probably than not, Pyle would not have been admitted to the Law School.

I. *Expert Testimony and Analysis*

82. Plaintiffs argue that based on a statistical analysis by Doctor Stephen Klein, an expert witness for plaintiffs, the evidence indicates that race was "more than a plus" as permitted by *Bakke*. Plaintiffs argue that race was the determining factor in the admission of minority candidates to the Law School in the years in question. Plaintiffs also contend that defendants applied a significantly disparate standard to applicants of different races. *See* Plaintiffs' Proposed Findings ¶ 99. The Court has carefully considered Doctor Klein's testimony and report, Exhibit 97, and the report and testimony of defendants' expert, Doctor Startz', Exhibits A-9 - A-12, and makes the following findings regarding the plaintiffs' contentions, and the reports and testimony of these experts:

(a) Neither expert made an analysis on a year-by-year basis. Doctor Klein admitted no opinions could be reached on a year-by-year basis. Rather, both experts considered the five year period 1994 - 1998 relevant in forming their opinions;

(b) Because there were different scales of measurement for the years in question, both experts converted all 5 years' statistics to a common scale of measurement. (Hereinafter the "Converted Scale" resulting in a "Converted Score"). Klein Report, Exhibit 97; Startz's report, Exhibit A-9. Smith had a Converted Score of 88. Rock's Converted Score was 90. Pyle's Converted Score was 88. Exhibit A-24. Professor Klein estimates approximately 460 applicants (all years) received "preferential treatment" because race was considered as a factor. Professor Startz estimates the number at 456. The Court finds the difference in these estimates to be insignificant;

(c) The Law School was much more likely to accept a minority applicant with a given Converted Score than a white applicant with the same score;

(d) Applying the percentage admission rates of white applicants to the pool of minority applicants at each Converted Score, it is predicted that the Law School would have offered admission to no more than 2 Filipino, 3 Native American, and 2 African American candidates each year race had not been a factor in admissions;

(e) While the Law School considered many diversity factors, the race/ethnicity factor was the most important diversity factor affecting admissions decisions in all years;

(f) The amount of preference given to an applicant due to his or her race varied depending upon his or her race. For example, Asian candidates were given less preference than African American candidates;

(g) The experts are unable to explain why 802 whites having a rating of 90 or below on the Converted Scale (See Table 5 Klein report, Exhibit 97) were admitted to the Law School; both experts agree that diversity factors other than race were involved in the Law School's decision to admit applicants to the Law School. Doctor Klein only analyzed 5 diversity factors in reaching his opinion, namely race, index score, fee waiver, residency and undergraduate major. Yet both experts agree and the Court finds that other diversity factors played an important role in the Law School's admissions decisions in all years for all applicants;

(h) White applicants at all levels were admitted with a Converted Score equal to or lower than minority applicants in each year. Exhibit A-1;

(i) There is no evidence that the persons admitted to the Law School in all years were not well-qualified applicants;

(j) Neither expert was able to offer any opinion as to whether race played any significant part in the decisions of the admissions committee as to ranking and resulting admission or placement on a waiting list. In general, the Court finds that applicants who were referred to the admissions committee for review (except the 136 whites in 1994 having

an index score of 195-196 - *See* Findings of Fact 63-65) were more qualified than applicants not referred to the committee. The Court finds that even the 136 white applicants with an index score of 195-196 referred to the admissions committee in 1994 were more qualified than plaintiff Smith;

(k) Both experts agree the number of Native American applicants was too small a sample to provide any meaningful analysis;

(l) If only index scores were considered during the 5 years in question, and minorities would have been admitted at the same levels as whites, most of the 460 minorities who received offers might not have been considered for admission. Exhibit 97, Table 6. However, many of these minority applicants had other diversity factors which would have been considered important in making admission decisions in all years. Therefore, it is clear that many applicants who received racial preferences would have been offered admission on the basis of other diversity factors;

(m) Whether an applicant received a fee waiver was not significant in the admissions process;

(n) Within each racial group, the index score was extremely important in decisions to admit applicants to the Law School. In all years considered, 94.19% of all applicants in the presumptive admit category were admitted. Exhibit A-9 at 5. Next to the index score, race was the most significant factor in the admissions decisions;

(o) The admission rates for the presumptive admit group by race in all years was substantially the same as the admission rate for white applicants. Exhibit A-9 at 5 (all admits 94.19% as compared to 94.64% for whites); and

(p) Neither expert was able to express an opinion as to whether any plaintiff would have been admitted if race could be considered as a factor in admissions decisions by the Law School.

J. *Non-racial Diversity Factor*

83. In each year the Law School considered racial as well as non-racial factors in the admissions process. At all times material, in connection with considering all applicants in the discretionary group, the Law School gave significant weight to non-racial diversity and other non-objective characteristics in the admissions process, including unusual life experiences, foreign language skills, geography, post-college work, advanced degrees, disabilities, achievements in athletics, business or the military, public service, and numerous other factors. In evaluating the discretionary group, factors indicating academic potential greater than those shown by LSAT scores and contributions to diversity were identified and weighed. No attempt was made to define the weight that could be accorded to any diversity factor, and the weight sometimes changed as the pool was reviewed. For example, while the school believed that it was desirable to admit persons with a particular characteristic, it did not give as much weight to this characteristic if there were a significant number of qualified persons with a similar characteristic in the pool. Also, while the school's admissions policy speaks separately of factors indicating academic potential and contributions to diversity, in practice, reviewers did not attempt to weigh these factors separately.

84. For example, a brief biography of 26 selected students for the 1994 entering class, as shown on Exhibit A-13, illustrates the non-racial diversity factors that these applicants presented for admissions. Similar diversity factors were also present in all years for applicants admitted to the Law School.

85. The Court finds that race as well as non-racial diversity factors were considered by the Law School in making its admissions decisions in all years in question.

86. Plaintiffs contend that Exhibit 104, a table prepared by plaintiffs to compare objective and diversity factors between applicants, is evidence that these various factors were not

uniformly applied and amount to "pretext" for decisions which plaintiffs contend were made substantially based on race. Exhibit 104 is strong evidence that different members of the Law School gave different weight to the same factors. For example, foreign language - Chinese was only a "minor plus" for a white applicant in the opinion of Professor Kummert as compared to a black applicant who received a "plus for fluency," by Dean Madrid in the same language. Exhibit 104 at 3. Similarly, in considering overseas experience, Professor Kummert gave no diversity consideration to an applicant who spent 2 years teaching English in Taiwan; in contrast, Dean Madrid gave a diversity plus to a Filipino-American applicant for a summer spent in the Netherlands and to a black applicant who said she had spent a "fair amount of time abroad." *Id.* at 1-2. Professor Kummert testified at trial that he was primarily focused on grades and index scores while Dean Madrid was more interested in diversity factors. The Court finds that Exhibit 104 is not evidence of pretext, but of the fact that both Professor Kummert and Dean Madrid applied their subjective judgment in evaluating all of the strengths and weaknesses of the applicants to the Law School. The Court finds that the various diversity factors other than race also played a substantial role in these objective admission decisions in all years.

87. In all years in question, the students who enrolled from the discretionary group had similar numeric qualifications:

Group	*No. Enrolled*	*Mean GPA*	*Mean LSAT*
White	314	3.50	159.98
Asian	105	3.46	158.19
Hispanic	59	3.33	156.54
Af. Amer.	38	3.24	154.30
Filipino	29	3.34	156.28
Nat. Amer.	25	3.19	156.12

Exhibit A-9 at 8 (summary statistics for discretionary group - all years).

K. *No Cut-Offs or Quotas or Intentional Discrimination*

88. There is no evidence that defendants intentionally established differential cutoffs, of any nature, or that they purposefully sought to exclude whites from consideration for seats that were offered to minorities. The number of relatively low scoring whites admitted establishes that there was no systematic exclusion of whites as a result of the "weight" given to race in the admissions process.

89. During the admissions process the Law School did not keep track of how many minority applicants were being accepted. Similarly, the Law School did not keep track of applicants being accepted with graduate degrees, public service or other diversity factors. The only category that the Law School tracked during the process was Washington residency.

90. The Court finds that defendants did not intentionally discriminate against any plaintiff in the admissions process.

91. There is no evidence that defendants applied significantly disparate standards to applicants of different races.

92. The treatment of Asian applicants demonstrates the Law School's lack of quotas. In 1990, approximately 5.1 % of the resident population of Washington was Asian or Pacific Islander (including Filipino), yet the Law School admitted over 24% of the Asian applicants and over 34% of the Filipino applicants. See Exhibit 69 for statistical data. The Asian applicants were generally well qualified and were admitted at only a slightly higher rate than white applicants (21% applied versus 24% admitted) and at a lower rate than all other minority applicants, and constituted only 14% of the enrolled class. Exhibit A-9. Plaintiffs implicitly suggest that the number of applicants admitted within an ethnic group should be limited to a number proportionate to the percentage of the group within the resident population. To limit applicants of any race or ethnic background in this manner would

be akin to establishing a quota or cut off and would not be permitted under *Bakke*.

III.

Conclusions of Law

1. Jurisdiction is vested in this Court under 28 U.S.C. §§ 1331 and 1343 because this action arises under the Fourteenth Amendment to the United States Constitution and under federal laws, 42 U.S.C. §§ 1981, 1983, and 2000d, *et seq.*

2. Venue in this Court is proper under 28 U.S.C. § 1391. This Court has personal jurisdiction over the defendants because the events giving rise to this action occurred in this district.

3. Plaintiffs challenge the Law School's use of race as a factor in its admissions process. Because the Law School has used race in its decision making process, plaintiffs are "entitled to a judicial determination that the burden [they are] asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265, 299 (1978). To survive constitutional review, the Law School's consideration of race must therefore (1) serve a compelling state interest and (2) be narrowly tailored to achieve that interest. *Adarand* v. *Peña*, 515 U.S. 200, 227 (1995).

4. A diverse student body is a compelling state interest and therefore "a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12; *Smith* v. *University of Washington, Law School*, 233 F.3d 1188, 1201 (9th Cir. 2000). Educational diversity is a compelling state interest because we recognize that all citizens are benefited when our nation's classrooms are filled with an atmosphere of "speculation, experiment, and creation" promoted by a diverse student body. *Bakke*, 438 U. S. at 312. By enriching a student's education with a variety of perspectives, experiences and ideas, a law school with a diverse student body helps equip its students to be a more productive mem-

ber of society. *Id.* at 313. ("[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples") (quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)).

5. "Ethnic diversity" can be "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Bakke*, 438 U.S. at 314. Race may be considered "a plus" as long as it does not insulate the individual applicants from comparison to all other candidates for the available seats. In other words, race can be a factor in determining a particular applicant's "potential contribution to diversity without the factor of race being decisive" when compared to the qualities exhibited by others. *Smith*, 223 F.3d at 1197 (quoting *Bakke*, 438 U.S. at 317).

6. The University of Washington Law School consciously considered race in granting offers of admission to the school. The purpose of the Law School's admission policy was to improve the quality of legal education and experience of its students by facilitating an open and vigorous exchange of ideas by students of diverse backgrounds. This has furthered the mutual understanding and respect of all students at the Law School during the years in question.

7. Consideration of race in evaluating applications for admissions was necessary to achieve the goal of educational diversity at the Law School. Failure to consider race would have had the potential effect of denying many qualified minority applicants an offer of admission to the Law School.

8. The Law School also considered other diversity factors in its admissions process including cultural background, activities or accomplishments, career goals, living experiences, disabilities or other special talents that might contribute to the diversity of the Law School community.

9. The Law School's admission program was intended to resemble a "Harvard type" admissions program consistent with *Bakke*. Such a program is described in *Bakke* as follows:

> [A Harvard-type admissions] program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

438 U.S. at 318. *Bakke* establishes that the "Harvard-type" admissions program, appended to the opinion of Justice Powell, represents an admissions program that considers race in a manner consistent with constitutional requirements, and that an admission policy modeled after the "Harvard-type" program is sufficiently narrowly tailored to satisfy the strict scrutiny standard to which racial classifications are subject. *Smith* v. *University of Washington Law School*, 2 F. Supp.2d at 1334-35.

10. The "Harvard-type" program sets out several guideposts for a court to use in determining whether a program is constitutionally permissible. An applicant's race or ethnicity cannot isolate him from comparison to other candidates, although it can be used as a plus in making that comparison. A law school must not use a quota system or set-aside seats which can only be filled by minority students. The admissions program must be sufficiently flexible to allow consideration of all elements of diversity and consider each applicant on an individual rather than racial class basis. *Bakke*, 438 U.S. at 317-19.

11. The Law School did not use an explicit or de facto quota system in implementing its race-conscious admissions system. The Law School acted in good faith in attempting to implement an admissions process that would satisfy *Bakke*. This Court assumes that a university intending to implement a "Harvard-type" program is acting in good faith and is not attempting to hide an illegitimate quota system. *Bakke*, 438 U.S. at 319. The Law School did not track the number of offers extended to minority candidates while the admissions process was ongoing. It did not have a pre-set goal of the number of minority students it wished to enroll but waited until all applications had been reviewed and only then attempted to maximize the diversity of the student body without reference to numerical targets. Non-minority candidates were not systematically excluded from consideration for admission at any index level and were not excluded from consideration by the "plus" given to minority candidates at the same levels. Non-minority candidates not selected for an offer of admission were not "foreclosed from all consideration for [a] seat simply because [they were] not the right color or had the wrong surname." *Bakke*, 438 U.S. at 316. Race was the most important diversity factor and accorded the most weight in evaluating diversity characteristics of discretionary applications, but this did not create a de facto quota system. Because race and ethnicity are a "plus," they undoubtedly "tipped the balance" in some applicants' favor. Importantly, however, this consideration of race and ethnicity did not operate to insulate any prospective student from competition with other applicants. The Law School may give different weight to different factors because "the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Bakke*, 438 U.S. at 318.

12. At all times material, each applicant to the Law School was considered on his or her own merits and compared to other applicants. Minority applicants were not set aside for

separate evaluation but considered in conjunction with other applicants under the same review process. The Law School did not have a "two-track" system for evaluating minority and non-minority applicants separately.

13. At all times material, diversity factors other than race were of crucial importance in evaluating discretionary applicants and determining which students would be offered admission. Non-minority students were offered admission at every academic ranking level minority students were offered admission. The Law School considered diversity factors other than race in weighing applications. The Law School further narrowed its use of race by using the ethnicity substantiation letter to better determine which minority students would fulfill the goal of creating a pool of students with diverse backgrounds. The ethnicity substantiation letter allowed the Law School to give preference to those minority students whose race had impacted their views and experiences rather than giving preference to students based on their race alone. Thus, the program was designed to be sufficiently flexible to give more weight to those minority candidates who had more to contribute to the diversity of the classroom.

14. Admissions programs designed to create educational diversity are unique in that they implicate both the First and Fourteenth Amendments. While diversity is a compelling state interest, consideration of race implicates applicants' Fourteenth Amendment rights. Conversely, "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312. Therefore, a university has a right to great judicial deference in how it selects its student body as this process falls within the "four essential freedoms" identified in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) ("[T]here prevail 'the four essential freedoms' of a university - to determine for itself on academic

grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

15. As a result of the Law School's consideration of race and other diversity factors, each applicant was treated as an individual "rather than as a mere stand-in for some favorite group." *Smith*, 233 F.3d at 1197. Admissions decisions are inherently subjective opinions about each applicant's academic potential. When courts are asked to review the substance of a genuinely academic decision, the Supreme Court has instructed judges to show "great respect" for the faculty's professional judgment. *Regents of the Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 225 (1985). That is because courts are not well-suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions. . . ." *Id.* at 226.

16. The Law School's admissions policy and the procedures followed in the years in question are virtually indistinguishable from the "Harvard-type" plan approved in *Bakke*. "As the logical result of reliance on the Harvard Plan, the unsuccessful applicants' statistical evidence accordingly cannot sustain their contention that the Law School's admission policy is unconstitutional." *See Grutter* v. *Bollinger*, 288 F.3d 732, 748 (6th Cir. 2002).

17. The Court concludes that the University of Washington Law School's admission program for the years of 1994, 1995, and 1996 was narrowly tailored to achieve the compelling state interest of educational diversity and does not violate federal law.

18. Defendants are entitled to have judgment entered in their favor on all claims.

DATED this 5th day of June, 2002.

/s/ THOMAS Z. ZILLY
THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543-0001

March 14, 2005

Mr. Viet D. Dinh
2121 Bancroft Place, N.W.
Washington, D.C. 20008

Re: Katuria E. Smith, Angela Rock, and Michael Pyle
v. University of Washington Law School, et al.
Application No. 04A785

Dear Mr. Dinh:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-captioned case has been presented to Justice O'Connor, who on March 14, 2005 extended the time to and including April 19, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
by
/s/ SANDY SPAGNOLO
Sandy Spagnolo
Case Analyst

(2)

Supreme Court, U.S.
FILED
JUN 10 2005
OFFICE OF THE CLERK

NO. 04-1408

IN THE SUPREME COURT OF THE UNITED STATES

KATURIA SMITH, ANGELA ROCK, AND MICHAEL PYLE,

Petitioners,

V.

UNIVERSITY OF WASHINGTON SCHOOL OF LAW, WALLACE D. LOH, ROLAND HJORTH, SANDRA MADRID, AND RICHARD KUMMERT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Attorney General of Washington, on behalf of the University of Washington School of Law and the individual respondents (collectively, the Law School), respectfully requests that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

As petitioners acknowledge (Pet. at 22), this case is a facially inappropriate vehicle to decide the questions presented, because there is only an abstract possibility that petitioners can obtain any relief whatsoever as a result of a decision by this Court.[1] The district court's findings of fact are the paramount obstacles to relief. It found that race was not a factor of any sort in the decision to deny petitioner Rock's application, because she was eliminated at a stage where the Law School did not give weight to racial diversity. Finding Of Fact (FF) 75, Pet. at 46a. It further found that, even if race was eliminated as a factor in the admissions process, petitioners Smith and Pyle would not have been admitted to the Law School. FF 68, Pet. at 44a; FF 81, Pet. at 47a-48a. These findings, which were barely challenged in the court below, establish a complete defense to liability, because petitioners have suffered no cognizable injury warranting relief. *Texas v. Lesage*, 528 U.S. 18, 21 (1999). Accordingly, their petition constitutes no more than a request for an advisory ruling by this Court.

---

[1] *See Medellin v. Dretke*, No. 04-5928, 2005 WL 1200824 (U.S. May 23, 2005) (writ dismissed where independent grounds may preclude relief).

Additionally, the two questions raised by petitioners are not fairly presented by the record. Below, petitioners did not rebut the Law School's evidence, which showed that consideration of race was necessary to obtain meaningful racial diversity without compromising academic standards. Instead, petitioners' arguments concerning the alleged inadequacy of the Law School's consideration of race-neutral alternatives were narrowly focused on the question of whether special consideration should have been given to Asian applicants. Now, however, petitioners argue that the Law School's practices fail narrow tailoring, because the unrebutted evidence concerning the effect of a race-neutral policy, and the conclusions that flowed from it, were not adequately documented at the time the challenged admissions policy was adopted. Pet. at 14. But this argument was not raised below and, in any event, lacks a proper foundation in the record.

As to the second question presented, petitioners request clarification of holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003), regarding the concept of "critical mass". Pet. at 18. *Grutter* held that the University of Michigan Law School's goal of enrolling a critical mass of African-American, Chicano, and Native American students was not an impermissible quota. *Grutter*, 539 U.S. at 335-36. Here, in sharp contrast, the Law School had no such numerical goals or targets. FF 54, Pet. at 39a-40a. Indeed, during the admissions process, the Law School did not even keep track of the numbers of minorities or non-minorities that it had admitted. Pet. at 53a. Therefore, insofar as petitioners suggest that there is a need to clarify whether or to what

extent the concept of critical mass permits schools to set admissions targets or goals, there is no basis in the record to consider this question.

To the extent that petitioners contend that the critical mass enrollment figures presented in *Grutter* (13.5-20.1% combined African-American, Chicano, and Native American enrollment) place some kind of ceiling on the number of minorities that may be admitted based on consideration of racial diversity (Pet. at 19), petitioners both misread this Court's decision and seek to create an issue where none exists.

By seeking to impose a limit on minority admissions, petitioners ignore this Court's instruction that the primary hallmark of narrow tailoring is an "individualized, holistic review of each applicant's file". *Grutter*, 539 U.S. at 337. It would defy this fundamental precept, and impose a de facto quota, to say that racial diversity (or any other form of diversity) may no longer be considered once a particular number or percentage of minority applicants has been admitted.

Furthermore, petitioners distort the record by suggesting that the raw percentages of students of color admitted (32%) and enrolled (35%) at the Law School during the years in question show that the Law School went overboard in its consideration of race. Pet. at 6-8, 20. First, petitioners fail to mention that persons of color constituted 28% of the applicant pool or that non-Asian minorities constituted 12% of applicants, 15% of admittees, and 18% of enrollees, percentages which fall easily within

the range present in *Grutter*. Trial Ex. A9 at 2. Second, by dealing solely in percentages, they fail to acknowledge the small size of the Law School's classes (170 students in the average entering class) and the consequently modest number of minority students enrolled, particularly non-Asian students. Trial Ex. A9 at 2; Pet. at 19a. Third, petitioners' argument ignores the district court's unchallenged finding that race was never the sole deciding factor with respect to minority admissions. FF 60, Pet. at 42a.

Finally, petitioners imply that a ruling in this case would be beneficial to the development of the law because, in the wake of the Michigan cases, colleges and universities may be in doubt regarding the need to demonstrate good faith consideration of race-neutral principles or the concept of critical mass. The Law School submits that a far wiser path would be to allow affected schools time to develop and refine their admissions policies and procedures in light of this Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

STATEMENT

I. The Law School's Admission Procedures

A. The Admissions Policy

The University of Washington School of Law is a national law school, attracting students from across the country and the world. It attracts far more applicants than it can admit. Like most other law schools, it long ago concluded that having a diverse student body, consisting of persons with

different backgrounds and experiences, enhances the educational experience for all students and produces lawyers better equipped to serve the needs of their clients and community. FF 21, Pet. at 32a-33a. *See also DeFunis v. Odegaard*, 416 U.S. 312, 324 (1974) (Douglas, J., dissenting).

Petitioners challenged the Law School's admissions policy and practices for the years 1994-96. The policy operating during those years was revised in 1989. The Law School revised its prior admissions policy because several constitutional law scholars at the Law School raised questions about it. FF 13, Pet. at 30a. The admissions policy was revised for the express purpose of making sure that the Law School was complying with the mandates of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). FF 15, Pet. at 30a. The policy, as adopted by the faculty, provided that "the Law School does not make all of its admissions decisions solely on the basis of predicted academic performance". FF 20, Pet. at 32a. Instead, the policy stated that "[i]mportant academic objectives are furthered by classes comprised of students having talents and skills derived from diverse backgrounds believed to be relevant to rich and effective study of law". FF 20, Pet. at 32a. Therefore, the policy provided for the consideration of racial and other diversity factors in the admissions process:

> "Factors that indicate this diversity include, but are not limited to, racial or ethnic origin, cultural background, activities or accomplishments, career goals, living experiences, such as growing up in a disadvantaged or unusual

environment or with a physical disability, or special talents." FF 20, Pet. at 32a.

Under the amended policy, the list of diversity factors "is not exhaustive and the factors are not of equal weight; moreover, no single factor is dispositive". FF 20, Pet. at 32a. Additionally, "no factor will confer admission on an academically unqualified applicant". FF 20, Pet. at 32a. The district court found that the Law School's purpose in adopting this policy was its faculty's belief in the value of diversity and its concern that its policy be consistent with constitutional standards. FF 21, Pet. at 32a.

B. The Admissions Process

For the years in question, the admissions process operated in essentially four stages. First, after the application deadline in January, a group of approximately 250 applicants with the highest index scores (a weighted combination of undergraduate GPA and LSAT scores) was selected for review by the admissions coordinator. This group was known as the "presumptive admits". The admissions coordinator would admit all of these applicants, except those whose files reflected some weakness or problem. The latter files were referred to the admissions committee, consisting of six faculty members and three students, for further review. The admissions coordinator's decisions in this regard were reviewed by the chair of the admissions committee, Professor and Associate Dean Richard Kummert, one of the respondents. FF 41-42, Pet. at 37a.

The district court found that race was not a factor in the review of presumptive admit files. FF 75, Pet. at 46a. There were very few racial minorities in the group and statistical analysis revealed no significant racial pattern in decision-making for this group. Trial Ex. A-9. Accordingly, the district court found that appellant Rock—who was a presumptive admit candidate in 1995 and was rejected after committee review—had failed to show that race was a factor in her rejection. FF 75, Pet. at 46a.

The second stage of the process involved candidates whose index scores placed them outside the presumptive admit group. These were referred to as the "presumptive deny" or "discretionary" group. FF 43, Pet. at 37a. The applicants in this group were reviewed by Assistant Dean Sandra Madrid, another of the respondents. As admissions dean, her job was to admit, deny, or refer applicants to the admissions committee. FF 43, Pet. at 37a-38a. In each year, Dean Madrid's practice was to read files starting with the lowest index scores and reading to the highest. She did not separate files for review based on race and applied the standards set forth in the admissions policy to each applicant, regardless of race. FF 60, Pet. at 42a; FF 73, Pet. at 45a; FF 80, Pet. at 47a.

In the third stage of the process was review of the files referred to the admissions committee. The admissions committee consisted of six professors and three students. FF 45, Pet. at 38a. Each member of the admissions committee would rank candidates on a scale of three to fifteen, and then the Law School would make additional offers, based solely on

committee rankings and sometimes residency. FF 46-47, Pet. at 38a-39a. Applicants referred to the admissions committee were considered more qualified than the applicants who were not referred. Both minorities and non-minorities were referred to the committee in each year and admitted as a result of committee review. FF 82(j), Pet. at 49a-50a.

Finally, in the fourth stage of the process, candidates reviewed by the admissions committee, but not ranked so highly as to be admitted initially, were placed on a waiting list, from which additional offers were made over the course of the spring and summer. FF 48, Pet. at 39a.

C. Results Of The Process

The Law School's admission policy and practices produced a highly qualified and diverse student body which, as measured by grades and test scores, had relatively small differences in academic qualifications across racial groups. Trial Ex. A-9; FF 82(i), Pet. at 49a. Throughout the process, substantial weight was given to non-racial diversity factors. FF 83, Pet. at 51a. As a result, many white applicants, who would not have been admitted based on their grades and test scores alone, were admitted based on diversity considerations. The number of these white "diversity" admits far exceeded the number of minorities admitted. Trial Ex. A-5.

Despite a relatively large pool of minority applicants (averaging 28% during the years studied[2]), elimination of race as a factor in admissions would have caused minority enrollment

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[2] Defs.' Trial Ex. A-9.

(which averaged 32%) to decrease to about 14%, almost all of whom would have been Asians, and thus only a token number of African-Americans, Hispanics, and Native Americans would have been enrolled. Trial Ex. A-011. Elimination of race as a factor would have caused only a small increase in the average white applicant's chances of admission, i.e., between 1994 and 1996, the average white applicant's chances of rejection were between 89% and 94%. Without race as a factor, the chances of rejection would have ranged from 85% to 86%. Trial Ex. A-011.

II. Proceedings Below

A. Initial Proceedings In The District Court And Court of Appeals

Smith, Rock, and Pyle (collectively, Smith) were among thousands of applicants that the Law School did not select to fill approximately 165 openings in each of its entering classes for the years 1994-1996. They brought suit in 1997 claiming that the Law School discriminated against them on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §§ 1981 and 1983. Petitioners also claimed a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). Petitioners sought damages and certification of a class for declaratory and injunctive relief. The district court granted class certification.

Prior to trial, the district court made two significant rulings. First, it held that Washington Initiative 200 (codified as Wash. Rev. Code § 49.60.400(1)), which prohibited granting

"preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education" and the Law School's consequent abandonment of the race-conscious admissions mooted Smith's prospective claims. Accordingly, it decertified the class and ordered the matter to proceed to trial solely on the claims for damages. Second, it held that Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), was binding precedent for the proposition that the narrowly tailored consideration for the purpose of fostering educational diversity was permissible.

Interlocutory review of these rulings followed, and the Ninth Circuit Court of Appeals affirmed the district court in all respects. *Smith v. Univ. of Washington, Law School*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

B. Trial

The case returned to the district court for a bench trial. Pet. at 25a. The focus of the trial was to determine whether the "Law School's program was narrowly tailored to meet the requirements of *Bakke* for the years in question" and on the Law School's contention that none of the petitioners would have been admitted if race were eliminated as a factor in the process. Pet. at 27a. At the conclusion of the trial, the district court entered ninety-two Findings Of Fact and eighteen Conclusions Of Law. Pet. at 27a-59a.

The district court found that there was "no evidence that [the Law School] applied significantly disparate standards to applicants of different

races". FF 91, Pet. at 53a. The court found that the Law School considered racial as well as non-racial factors in the admissions process. Non-racial factors included "unusual life experiences, foreign language skills, geography, post-college work, advanced degrees, disabilities, achievements in athletics, business or the military, public service, and numerous other factors". FF 83, Pet. at 51a. The court found that "other diversity factors played an important role in the Law School's admissions decisions in all years for all applicants". FF 82(g), Pet. at 49a. The district court found that there was "no evidence that the persons admitted to the Law School in all years were not well-qualified applicants". FF 82(i), Pet. at 49a.

The district court concluded that "[c]onsideration of race in evaluating applications for admissions was necessary to achieve the goal of educational diversity at the Law School." Conclusion Of Law (CL) 7, Pet. at 55a. "Failure to consider race would have had the potential effect of denying many qualified minority applicants an offer of admission to the Law School." CL 7, Pet. at 55a.

The district court also found that the "Law School did not establish any racial 'quotas,' 'targets' or 'goals' for admission or enrollment". FF 52, Pet. at 39a. Indeed, the Law School "did not keep track of how many minority applicants were being accepted". FF 89, Pet. at 53a.

The court concluded that as "a result of the Law School's consideration of race and other diversity factors, each applicant was treated as an individual rather than as a mere stand-in for some

favorite group". CL 15, Pet. at 59a (internal punctuation omitted). Thus, the "consideration of race and ethnicity did not operate to insulate any prospective student from competition with other applicants". CL 11, Pet. at 57a. The trial court concluded that "[m]inority applicants were not set aside for separate evaluation but considered in conjunction with other applicants under the same review process." CL 12, Pet. at 57a-58a. Thus, the Law School "did not have a 'two-track' system for evaluating minority and non-minority applicants separately". CL 12, Pet. at 58a.

The district court ultimately concluded that the Law School's admission program for the years in question "was narrowly tailored to achieve the compelling state interest of educational diversity and [did] not violate federal law". CL 17, Pet. at 59a.

With respect to the Law School's contention that its consideration of race made no difference in the outcome of petitioners' applications, the district court found that petitioners Smith and Pyle would not have been admitted to the Law School under a race-neutral policy. FF 68, Pet. at 44a; FF 81, Pet. at 47a-48a. With respect to petitioner Rock, whose application was eliminated at the presumptive admit stage, the court found that race was not a factor in the Law School's consideration of applications at that stage and, therefore, "[r]ace did not play a substantial role in Rock's denial of admission to the Law School." FF 75, Pet. at 46a.

C. The Ninth Circuit Decision

Smith appealed the district court's decision to the Ninth Circuit Court of Appeals, which stayed

consideration of the case pending this Court's decisions in the Michigan cases. After *Grutter* and *Gratz* were decided, the Ninth Circuit concluded that the only thing "left for us to decide is whether the Law School's admissions program was narrowly tailored to meet the compelling interest of educational diversity during the three years in which the plaintiffs applied . . . in order to determine whether the plaintiffs might be entitled to damages". Pet. at 2a. The court carefully reviewed the University of Michigan Law School's (UMLS) "Harvard-type" admissions process that this Court sustained in *Grutter*. Pet. at 6a-12a. It concluded that "the Law School's admissions program comported with the criteria set forth in *Grutter*". Pet. at 13a.

The court held that the "Law School did not establish quotas, targets or goals for admission or enrollment of minorities". Pet. at 12a. Moreover, "the percentage of minorities varied each year in a manner inconsistent with the existence of a quota". Pet. at 12a. The court found that the "Law School's review of applications demonstrates the sort of highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment". Pet. at 12a. The fact that the "Law School also accepted nonminority applicants with grades and test scores lower than underrepresented minority applicants who were rejected, [showed] that the Law School seriously weighed many other diversity factors besides race that could make a real and dispositive difference". Pet. at 13a (internal punctuation omitted). Thus,

unlike the "the program found unconstitutional in *Gratz*, the racial and ethnic pluses here did not have the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant". Pet. at 13a (internal punctuation omitted).

Smith attempted to "differentiate the Law School's program from UMLS's, focusing on three discrete aspects of the admission process". Pet. at 14a. First, Smith argued that during one or more of the relevant years, the Law School "provided an opportunity to some minority applicants to supplement applications through a so-called 'ethnicity substantiation letter'". Pet. at 14a. The Law School "sent the letter to some applicants who identified themselves as racial or ethnic minorities on the front page of their applications [t]o help ascertain whether the applicant's race or ethnicity should be considered a plus factor". Pet. at 14a. The Court of Appeals concluded that this letter "supports rather than undermines the constitutionality of the Law School's program". Pet. at 14a. This is because "the Law School used the letter to more narrowly tailor the awarding of a plus for an applicant's race or ethnicity by seeking more information about the role that race or ethnicity played in the applicant's life, rather than simply relying on the applicant's minority status as such." Pet. at 14a.

Second, Smith argued "that Asian Americans, who were given a slight plus for racial diversity, should not have been given a plus at all because the Law School could have attracted what the plaintiffs deem a 'critical mass' of Asian American students without a preference". Pet. at 17a. The Ninth

Circuit found several problems with this argument. To begin with, "it assumes that the category 'Asian American' is homogenous". Pet. at 17a. In fact, "applicants whose families or who themselves originated from the Philippines, Viet Nam, Cambodia, Taiwan and the People's Republic of China—to name a few countries of origin from which the Law School specifically sought applicants—have different cultures, backgrounds and languages, and thus would bring different experiences to the educational environment". Pet. at 17a. Moreover, the court found "that relying on percentages to define a critical mass may be distortive, particularly when dealing with small numbers". Pet. at 19a. For example, "7 to 9 percent of the Law School's 170-person class would be approximately 12 to 15 students. By contrast, 7 to 9 percent of UMLS's 350-person class would be approximately 25 to 32 students." Pet. at 19a. "Although the percentages are the same, the difference in actual numbers–12 to 15 as opposed to 25 to 32–may be more important when considering that the goal of a critical mass is to provide for meaningful numbers, or meaningful representation, such that minority students are encouraged to participate in the classroom and not feel isolated." Pet. at 19a.

Finally, Smith sought to distinguish the Law School's admissions program from the UMLS program by arguing "that the Law School created 'separate tracks' for white and minority applicants, pointing primarily to the referral in 1994 of white applicants with index scores of 195 and 196 to the Admissions Committee". Pet. at 19a-20a. This

separate review of minority students in 1994 was done because "the Law School wanted to make an early decision on minority candidates who were extremely well qualified based solely on their high index scores". Pet. at 20a-21a. Minority students with these qualifications were very rare and if the Law School was to have "a serious opportunity of trying to have them actually enroll at the law school . . . [it] had to try to communicate [its] eagerness by promptly admitting them and therefore not wait through the process basically of the group of applications that would come out of the admissions committee". Pet. at 21a. The Ninth Circuit concluded that "the separate review did not interfere with the Law School's ability to provide appropriate consideration of the white applicants". Pet. at 20a.

After the decision by the Ninth Circuit, Smith sought an extension of time to file a Petition For A Writ Of Certiorari to give new counsel an opportunity to review the case. Justice O'Connor granted the extension. Pet. at 60a. Smith filed her petition April 19, 2005.

REASONS FOR DENYING THE WRIT

I. The District Court's Findings Of Fact Preclude Any Relief

The district court's finding that race was not a substantial factor in the decision to deny petitioner Rock's application (Pet. at 46a) mandates the conclusion that she failed to make a claim under 42 U.S.C. § 1981, 42 U.S.C. § 1983, or Title VI (42 U.S.C. § 2000d). *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). The district court's findings that petitioners Smith and Pyle

would not have been admitted even in the absence of consideration of race established a complete defense to liability under *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (the "government can avoid liability by proving that it would have made the same decision without the impermissible motive").

Petitioners failed to assign specific error to these findings and did not make the showing required to invalidate the trial court's findings of fact.[3] Pet. at 3a n.1. Instead, their argument for reversal was focused on the premise that other aspects of the admissions process were invalid or that the admissions process might have been structured differently if race were removed as a factor. Pet'rs 9th Cir. Br. at 60-62. The district court and the Ninth Circuit held, however, that those other aspects (the use of "ethnicity substantiation letter" and referral of white applicants with certain index scores to the admissions committee) were not invalid. Pet. at 15a-16a, 22a, 24a; CL 12-13, Pet. at 57a-58a. Petitioners do not challenge these holdings here.

Smith argues that, notwithstanding the district court's finding of no liability, she is entitled to relief, because she meets the requirements for standing under *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). She also argues that nominal damages may be recoverable under the rationale of *Carey v. Piphus*, 435 U.S. 247 (1978). Pet. at 23 & n.16. These arguments are unavailing.

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[3] *See* Fed. R. Civ. P. 52(a); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 484-85 (1985).

First, Smith's standing to bring this case is irrelevant after entry of findings that preclude liability. *Lesage*, 528 U.S. at 21 ("where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability").

Smith's reliance on *Carey* is also misplaced, because *Carey* involved procedural due process rights, not an equal protection challenge. While *Carey* ventured that nominal damages may be appropriate where constitutionally required process was not afforded, even though the result would have been the same if the process had been afforded, the Court cautioned against extension of its reasoning beyond the procedural due process setting, stating:

> "[T]he elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. . . . [T]hese issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question." *Carey*, 435 U.S. at 264-65.

While a constitutional injury may occur as the result of denial of a required process, even though the result would have been no different had the process been afforded, no constitutional injury occurs as the result of denial of a government benefit, when

no required process attends the denial, and where the result would have been the same absent the presence of an allegedly illegal factor. In the latter case, "[t]he constitutional principle at stake is sufficiently vindicated if [the plaintiff] is placed in no worse a position than if he had not engaged in the [constitutionally protected] conduct." *Mt. Healthy City Sch. Bd. of Ed.*, 429 U.S. at 285-86.

Petitioners here are in precisely the same positions that they would have been in absent the Law School's consideration. Accordingly, there is no relief that this Court can provide them. *Cf. Montana v. Imlay*, 506 U.S. 5, 6 (1992) (Stevens, J., concurring in the dismissal of the writ of certiorari as improvidently granted) ("[N]o matter which party might prevail in this Court, the respondent's term of imprisonment will be the same. At oral argument, neither counsel identified any way in which the interests of his client would be advanced by a favorable decision on the merits—except, of course, for the potential benefit that might flow from an advisory opinion. Because it is not the business of this Court to render such opinions, it wisely decides to dismiss a petition that should not have been granted in the first place." (Footnote omitted.)).

II. The Questions Raised Are Not Fairly Presented By The Record

A. Race-Neutral Alternatives

Smith argues that the Law School's admissions policy fails strict scrutiny with respect to consideration of a workable race-neutral alternative means of achieving diversity, because its faculty did not make an "affirmative finding" in this regard,

based on "evidence of record". Pet. at 10-11. These alleged requirements are not found anywhere in *Grutter* and, in any event, this claim was not raised in the courts below as a basis for invalidating the Law School's policy.

1. The Record In *Grutter*

Nearly all selective American law schools have used for many years a mix of LSAT, undergraduate grade point average, and more subjective factors, including racial and other forms of diversity, as admissions criteria. *See* Br. Amicus Curiae American Ass'n Law Schools, *Grutter v. Bollinger*, 539 U.S. 306 (2003). These schools have recognized that, largely because of persistent test score differentials between minority and non-minority applicants, application of conventional measures of qualification would result in exclusion of many capable minority applicants. *Id. See also* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis Of The Consequences Of Abandoning Race As A Factor In Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1 (1997). Prominent American law schools and their leaders have concluded that there are no reasonable race-neutral alternatives that would achieve the same balance of diversity and quality as race-conscious diversity plans. Wightman, 72 N.Y.U. L. Rev. 1; Br. Amicus Curiae American Law Deans Ass'n, *Grutter*.

The evidence concerning the University of Michigan Law School's (UMLS) consideration of race-neutral alternatives pointed to the same conclusion. The district court heard "some testimony from

witnesses who indicated that underrepresented minority students cannot be enrolled in significant numbers unless their race is explicitly considered in the admissions process". *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 852 (E.D. Mich. 2001). A member of the admissions committee, for example, testified that the committee was unaware of any viable alternatives to the consideration of race in admissions when it first drafted its race-conscious admissions policy, and it became aware of no viable alternative thereafter. Defs.' Post-Trial Mem. Respecting Proposed Findings Of Fact And Conclusions Of Law No. 02-241 at 27. The committee member supported this conclusion at the trial by relying on Prof. Wightman's 1997 study. *Grutter*, 137 F. Supp. 2d at 852. The law school's former dean and an expert witness also confirmed that race-neutral alternatives in school admissions had failed elsewhere. *Id.*

On appeal, the Sixth Circuit additionally noted that testimony showed the law school engaged in both pre- and post-admission recruiting activities to enroll underrepresented minority students. *Grutter v. Bollinger*, 288 F.3d 732, 750 (6th Cir. 2002). Given this, and the evidence that significant numbers of underrepresented minority students cannot be enrolled unless race is explicitly taken into account, the Sixth Circuit found that the law school adequately considered race-neutral alternatives. *Id.* And, on this record, this Court agreed that the law school "sufficiently considered workable race-neutral alternatives". *Grutter*, 539 U.S. at 340.

2. The Record Here

The evidence adduced by the Law School showed that, like the University of Michigan, it has long recognized that application of conventional measures of academic merit disproportionately exclude capable minority applicants. Pet. at 29a.[4] Over the many years since it first implemented a race-conscious admissions policy, the Law School also sought to increase minority enrollment through measures other than admission preferences. Pet. at 35a. Despite its efforts to attract the most qualified minority applicants, at the times in question, the Law School recognized that, while an index based on LSAT scores and undergraduate grade point average is a fairly accurate predictor of first year law school performance, strict application of these measures continues to result in rejection of most qualified minority applicants. Tr. Vol. 2 at 213-14, 227-32; Tr. Ex. A-4. For example, only three African-Americans applied to the Law School in 1994 with scores at or above the average for all admitted

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[4] *See DeFunis v. Odegaard*, 82 Wash. 2d 11, 40, 507 P.2d 1169, 1186 (1973), *judgment vacated by DeFunis v. Odegaard*, 416 U.S. 312 (1974), *judgment reinstated by DeFunis v. Odegaard*, 84 Wash. 2d 617, 529 P.2d 438 (1974) ("the decision to consider race in interpreting a minority applicant's numerical grade averages and test scores was reached because of the opinion within the university that such standardized indicators inherently exclude a disproportionate number of minority applicants").

applicants, all of whom were admitted but none of whom enrolled. *Id.*[5]

A study performed for purposes of this litigation showed, without dispute, that application of admission rates at the Law School for non-minorities to minority applicants with the same grades and test scores would have resulted in classes that were 85-89% white (140-147 students per year), 7-9% Asian (12-15 students), 1-3% Hispanic (2-5 students), 0-2% African American (0-3 students), 0-1% Native American (0-2 students), and 0-1% Filipino (0-2 students). Tr. Ex. A-11.

To avoid this result, the Law School decreased emphasis on numeric measures in its 1989 admissions policy, focusing instead in all forms of diversity, including racial diversity. By slightly varying from the norms with respect to these numeric measures of merit, the Law School was able to admit and enroll significant numbers of highly qualified minorities (FF 82(i), Pet. at 49a; FF 83, Pet. at 52a) and thereby achieve its goal of improving the quality and richness of the educational experience. FF 21, Pet. at 32a-33a; Tr. Vol. 2 at 222-32.

In the face of this data and prevailing Ninth Circuit precedent,[6] petitioners did not argue at trial

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[5] There were only 78 African-American applicants in the entire country with grades and scores above these averages who applied to an accredited law school in 1993-94. Tr. Ex. A-3.

[6] *See Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1990) ("the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the [affirmative action program]").

that the absence of a contemporaneous "affirmative finding" concerning the absence of race-neutral alternatives doomed the Law School's policy, nor did they argue that there was a lack of evidence to support the need for race-conscious measures generally. *See* Tr. Vol. 1 at 3-6 (opening statement); Tr. Vol. 5 at 741-86 (closing argument). Instead, petitioners focused their arguments on the narrower issue of whether the Law School had shown a need to give a "diversity plus" to Asian applicants. Tr. Vol. 5 at 750.

After the district court rejected this argument (Pet. at 53a-54a), petitioners renewed it on appeal. In the section of their opening brief entitled "Overbroad Preferences And The Failure To Consider Race Neutral Alternatives", petitioners argued that the Law School had failed to show a need for giving preference to Asians and more generally argued that the Law School gave too much weight to racial diversity. Pet'rs 9th Cir. Br. at 39-43. In their reply brief, they again focused on allegedly "overbroad preferences." Pet'rs 9th Cir. Reply Br. at 5-8.

Nowhere, at either the trial or appellate level, did petitioners suggest that the Law School's policy was defective for lack of a contemporaneous declaration that race-neutral alternatives were inadequate or that there was a lack of evidence to support such a conclusion; nor did they challenge the district's court's conclusion that "[c]onsideration of race in evaluating applications for admissions was necessary to achieve the goal of educational diversity at the Law School. Failure to consider race would have had the potential effect of denying many

qualified minority applicants an offer of admission to the Law School." FF 7, Pet. at 55a.

3. The Failure To Raise A Specific Challenge To The Need For The Use Of Race-Based Measures And The Congruity Of The Record Here With The Record In *Grutter* Requires Denial Of The Writ

This Court has long adhered to the principle that it will not grant certiorari to review questions not adequately raised below. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1927). Here, petitioners' former counsel (who are very experienced in litigation of this nature) made the choice to focus their attack on a narrow aspect of the Law School's justification for race-conscious measures. It is therefore highly disingenuous for new counsel to suggest (Pet. at 12) that the Ninth Circuit erred by failing to decide an issue that was never raised by their predecessors.

In any event, however, the record here is consistent with that in *Grutter* in showing the need for race-conscious measures and in supporting the Law School's conclusion regarding the absence of reasonable race-neutral alternatives. Petitioners' argument that this evidence and conclusion was not affirmatively documented at the time the admissions policy was adopted is not an adequate basis to grant review.

4. There Is No Circuit Conflict

Smith claims that the decision below conflicts with *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001), and *Cavalier v. Caddo Parish School Board*, 403 F.3d 246 (5th Cir. 2005). Pet. at 14-16. *Johnson* and *Cavalier* are, however, factually distinguishable from the decision below and do not conflict with it.

Johnson involved an undergraduate admissions system very much like the one invalidated in *Gratz*. *Johnson*, 263 F.3d at 1257 ("UGA's policy is not only rigid and incomplete, the benefit it awards each and every non-white applicant is wholly, and concededly, arbitrary."). Furthermore, the University of Georgia did not attempt to defend its policy under narrow tailoring principles, other than to suggest that it was analogous to the "Harvard Plan" approved in Justice Powell's *Bakke* opinion. *Johnson*, 263 F.3d at 1261. Accordingly, and unlike the Law School, it made no effort to demonstrate the effect of eliminating race or address the tension between using valid measures of academic potential and the disparate impact that those measures have on many qualified minority candidates. *Id.* at 1259-60. There is no circuit conflict, because the Law School here made the showing that was deemed lacking in *Johnson*.

In *Cavalier*, a school district attempted to defend a race-based plan for assigning students to a middle school magnet program on the basis that the plan was permitted under a 20-year-old consent decree which had been designed to remedy past segregative practices in the district. The school

district had previously been granted unitary status, however, and the school board conceded that it could not justify the plan as necessary to remedy present effects of past illegal practices. *Cavalier*, 403 F.3d at 258-59. It also conceded that it had no other compelling interests that could justify its use of race. *Id.* Consequently, like the University of Georgia, it simply offered no evidence of consideration of race-neutral alternatives. *Id.* at 260. There is, therefore, no conflict between the holding here and the holding in *Cavalier*.

B. "Critical Mass"

In *Grutter*, the Court determined that the UMLS's goal of enrolling what it termed a "critical mass" of African-American, Hispanic, and Native American students did not transform that school's race-conscious program into a prohibited quota system. *Grutter v. Bollinger*, 539 U.S. 306, 335-36 (2003). Now, Smith asks this Court to decide whether the concept of "critical mass" imposes a lid on the number of minorities who may be admitted as a result of the type of holistic, individualized review approved by the Court in *Grutter*.

To set up this question, Smith posits "a program that had as its goal the enrollment of 50% minority students". Pet. at 19 & n.12. As the unchallenged findings of the district court establish, however, there is no basis for petitioners' assertion that the Law School had any kind of numeric goal or target that it sought to attain. Pet. at 4a; FF 88-89, Pet. at 53a; CL 11, Pet. at 57a. Furthermore, Smith again ignores the district court's unchallenged

finding that race "was never the sole determining factor" in admissions decisions. FF 60, Pet. at 42a.

When these factors are considered, it becomes apparent that petitioners' argument is really a plea to turn off consideration of racial diversity once a critical mass of minorities has been admitted, while presumably continuing consideration of all non-racial diversity factors. Framed in this manner, it becomes clear, as both the Ninth Circuit and the district court noted (Pet. at 18a; FF 92, 53a-54a), that petitioners' argument would violate this Court's instructions by at once imposing a maximum quota on minorities, while eliminating the Law School's ability to consider "all the ways an applicant might contribute to a diverse educational environment". *Grutter*, 539 U.S. at 337.

There is no reason for this Court to entertain this question and certainly no reason to do so on this record, which lacks facts even remotely supporting the premise on which it is based.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

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